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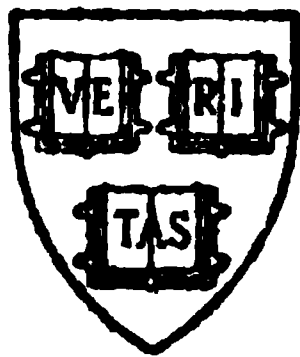
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35
REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

79

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS HANDED DOWN NOVEMBER 26, 1879,
TO AND INCLUDING DECISIONS OF JANUARY 27, 1880,

WITH

NOTES REFERENCES AND INDEX.

BY H. E. SICKELS,
STATE REPORTER.

VOL. XXXIV.

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JUDGES OF THE COURT OF APPEALS.

SANFORD E. CHURCH,* CHIEF JUDGE.

CHARLES J. FOLGER,† CHIEF JUDGE.

CHARLES A. RAPALLO,

CHARLES ANDREWS,

THEODORE MILLER,

ROBERT EARL,

GEORGE F. DANFORTH.

FRANCIS M. FINCH,‡

ASSOCIATE JUDGES.

* Died May 14, 1880.

† Appointed May 20, 1880, *vice* Sanford E. Church.

‡ Appointed May 25, 1880, *vice* Charles J. Folger, appointed Chief Judge.

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
COMMENCING NOVEMBER 23, 1879.

ARCHIBALD S. GREEN, Respondent, v. ABIJAH C. DISBROW,
Appellant.

79	1
140	161

In an action to recover a balance alleged to be due upon a store account, for goods sold and delivered, where the defense was the statute of limitations, it appeared that defendant had delivered to plaintiff small quantities of butter and eggs at different times to be credited upon the account. *Held*, that the action was "upon a mutual, open and current account, where there have been reciprocal demands between the parties," within the meaning of the provision of the Code of Procedure (§ 95*) which declares that in such case the cause of action shall be deemed to have accrued from the time of the last item proved; and that as the last item was within six years the claim was not barred.

The words "reciprocal demands" in said provision means no more than "mutual accounts" as used in the former statutes.

An account of items on one side and payments on the other is not a mutual account; but when goods are delivered by a debtor to a creditor having an account against him it will not be presumed that they are delivered in payment; before they can be held to have been so delivered there must be proof that it was so intended, and that both parties so understood it.

It is not essential in order to make an account of mutual or reciprocal demands that each party shall have an independent cause of action against the other for his side of the account; the cause of action is only for the balance, and that party is only the debtor against whom the balance is found.

* See similar provision of Code of Civil Procedure. § 396.

Statement of case.

- The history of the statutory provisions upon this subject given, and the authorities thereon, collated and discussed.

Gold v. Whitcomb (14 Pick., 188); *Adams v. Carroll* (85 Penn., 209); *Peck v. N. Y. and L. [U. S.] M. S. S. Co.* (3 Bosw., 622), distinguished and limited.

Lowber v. Smith (7 Barr. [Penn.], 381), questioned.

Defendant's son J., who purchased the goods on defendant's account after testifying as a witness for plaintiff that the principal articles of clothing and groceries for himself and family were obtained of plaintiff, that he often went himself and sent others to plaintiff's store for goods, was asked and permitted to state under objection and exception, the quantity and amount of articles thus purchased of plaintiff. *Held*, no error.

Plaintiff, after proof that defendant looked over and examined the account upon his books, offered in evidence a paper proved to be a statement of the account so examined; it was objected to on the ground that the account had not been sufficiently proved; no objection was made because of the non-production of the books. The objection was overruled and the statement received. *Held*, no error.

(Argued September 29, 1879; decided November 18, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts are set forth sufficiently in the opinion.

The case upon a former appeal is reported 56 N. Y., 334.

Samuel Hand, for appellant. The referee erred in holding the statute of limitations not applicable, and that there was, between the parties, a *mutual*, open and current account, in which there were *reciprocal demands*. (*Catlin v. Skoulding*, 6 T. R., 189; *Chamberlain v. Cuyler*, 9 Wend., 126; New Code, § 386; Old Code, § 95; *Lowber v. Smith*, 7 Barr. [Pa.], 381; *Ingram v. Sherard*, 17 S. & R., 347; *Hay v. Kramer*, 2 Watts & S., 137; *Adams v. Carroll*, 85 Pa., 509; *Gold v. Whitcomb*, 14 Pick., 188; *Kimball v. Brown*, 7 Wend., 322; *Warner v. Sweeney*, 4 Nev., 101; *Peck v. Liverpool Stp. Co.*, 5 Bosw., 226; *Hallock v. Losee*,

Statement of case.

1 Sand., 220.) Unless the sale to Jonathan was on defendant's *sole credit*, his undertaking is collateral, and not being in writing is void. (*Brady v. Sackrider*, 1 Sand. Sup. Ct., 514, 515; *Anderson v. Hayman*, 1 H. Bl., 120; *Cahill v. Bigelow*, 18 Pick., 369, 372; *Matron v. Wharam*, 2 T. R., 80; *Hill v. Raymond*, 3 Allen, 540; Browne on St. of Frauds, § 197; *Swift v. Pierce*, 13 Allen, 136; *Dixon v. Frazee*, 1 E. D. Smith, 32, 34.) The referee was right in excluding plaintiff's books. (*Vosburgh v. Thayer*, 12 J. R., 461; *Tomlinson v. Borst*, 30 Barb., 42.)

Rufus W. Peckham, for respondent. A perfect case was made out for the admission of the books, during the running of the account, including the transcripts from the lost blotter. (*Gilbert v. Sage*, 57 N. Y., 639; *Wilson v. Knapp*, 70 id., 596; *Payne v. Hodge*, 7 Hun, 612; *affmd.*, 71 N. Y., 598.) Under the facts, secondary evidence of the contents of the lost blotter was perfectly admissible. (*Enders v. Sternburgh*, 2 Abb. Ct. of App., 31; S. C., 1 Keyes, 264; *Mandeville v. Reynolds*, 68 N. Y., 528.) There was no error committed in the refusal to nonsuit, on the ground that there was a bar in the statute of limitations. (*Kimball v. Brown*, 7 Wend., 322; *Catling v. Skoulding*, 6 T. R., 189; *Ramchander v. Hammond*, 2 J. R., 200; *Penniman v. Rotch*, 3 Met., 216; *Gold v. Whitcomb*, 14 Pick., 188; *Norton v. Larco*, 30 Cal., 126; *Warren v. Sweeney*, 4 Nev., 101; *Hay v. Kramer*, 2 W. & S., 137; *Ingram v. Sherard*, 17 S. & R., 347.) This case was not barred by the statute, there being a mutual, open and current account, where there had been reciprocal demands. (7 Wend. and 3 Met., *supra*; *Valentine v. Conner*, 40 N. Y., 248; *Chubbuck v. Vernam*, 42 id., 432; *Aberlander v. Spiess*, 45 id., 175.) It was proper to charge interest upon the account, as charged by plaintiff. (*McCollum v. Seward*, 62 N. Y., 316; *Mercer v. Vose*, 67 id., 56.) The question to witness to state, as near as he could, the amount of the articles purchased of Green for Jonathan's use, and that of his family, was properly per-

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mitted. (*Bank v. Cowan*, 2 Abb. Ct. of App., 88; *Crippen v. Morss*, 49 N. Y., 63.)

EARL, J. This action was commenced June 23, 1869, to recover upon a store account for goods claimed to have been furnished by the plaintiff to defendant's son, Jonathan Disbrow, at the request of the defendant and upon his credit.

We think there was sufficient evidence to justify the finding of the referee that the goods were furnished upon the sole credit of the defendant and upon his promise to pay for them. The only defense, therefore, to be considered here is the statute of limitations.

The account commenced on the 6th day of November, 1855, and continued to November 11, 1863; and during that time the defendant caused to be delivered to the plaintiff, by his son, certain small quantities of butter and eggs at different times to be credited upon the account, and the balance of the account, as adjusted by the referee is \$745.55. All the items of plaintiff's account accrued before June 23, 1863, except items amounting in all to the sum of \$104.29; and the last item of credit in the account is for eggs delivered to the plaintiff August 20, 1862.

The referee decided that there existed between the parties a mutual, open and current account, in which there were reciprocal demands, and hence that no part of the account was barred by the statute. The claim of the defendant is that the butter and eggs were delivered to and received by the plaintiff as payment upon the account, and hence that this is not a case of reciprocal demands, within the meaning of the statute; or in other words, that the defendant never had a right of action against the plaintiff for the butter and eggs, and hence that there were not reciprocal demands, within the meaning of the statute.

There was sufficient proof to justify the referee in finding that the butter and eggs belonged to the defendant and were delivered at his request. The evidence is that he directed his son and his wife to take the butter and eggs to the plain-

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tiff and have them applied upon the account ; and they took them to the plaintiff and he received them, and without any particular direction or agreement with him, he at once credited them in his account. No other account was kept of them except that kept by him. That this is a mutual, open and current account of reciprocal demands, within the meaning of the statute, I can entertain no doubt.

By the common law there was no stated or fixed time as to the bringing of personal actions. The time for the commencement of such actions was first regulated in England by the statute chapter 16 of 21, James I. But from the operation of that statute were excepted "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." It was held that the exception in that statute applied only to the action of account or to an action on the case for not accounting, and, after considerable vacillation in the decisions, that accounts within the exception were not barred even if there were no items on either side of the account within six years : (*Robinson v. Alexander*, 8 Bligh, [N. S.], 352; *Inglis v. Haigh*, 8 Mees. & Welsb., 770.) It was also held that the exception in the statute extended only to accounts concerning the trade of merchandise between merchant and merchant, and not to other accounts. Other accounts were held to be within the statute, and the cause of action upon them was held to accrue from the last item of credit therein. In *Catling v. Skoulding* (6 T. R., 189), Lord KENYON, speaking of a case not within the exception in the statute, said : "I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained ; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute." It was only mutual, open and current accounts that could come within the exception of the statute as to

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merchants' accounts; and in the case of accounts not concerning the trade of merchandise, to escape the bar of the statute there must have been in the account an item of credit within six years.

The statute of James, with slight verbal alterations, became the law of this State, and the exception as to merchants' accounts continued until the adoption of the Revised Statutes: (see the "act for the limitation of criminal prosecutions and of actions at law," passed April 8, 1801.) And it was early held that the law as enacted in this State should receive the same construction as the statute of James had received in England: (*Ramchander v. Hammond*, 2 J. R., 200.)

There was some confusion and uncertainty in the English decisions, and there was soon some departure in this State from the law as settled in England.

The provision of the Revised Statutes (2 R. S., 297, § 23) is as follows: "In all actions of debt, account or assumpsit brought to recover a balance due upon a mutual, open and current account, the cause of action shall be deemed to have accrued from the time of the last item proved in such account." The language used in this section was not, it is believed, intended to work any change in the prior law, as appears from the note of the revisers to this section, which is as follows: "This section is proposed instead of the expression in section 5, 1 R. L., 186, 'other than actions which concern the trade of merchandise between merchant and merchant, their factors or servants.' This has given occasion to numerous decisions, some of them contradictory, which left the law for many years quite uncertain. It is now decided: (1.) That the exception in the statute extends to all persons whether merchants or others; (*Murray v. Coster*, 20 J. R., 583); and most of the modern cases support this remark: (2.) That where all the accounts have ceased for six years, the demand is barred, and consequently that where there is an open, current, mutual account within six years, the whole account may be recovered; (2 J. R., 201; *Coster v.*

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Murray, 5 J. Ch. Rep., 522; *William v. Gwyn*, 2 Saunders, 127; *Tucker v. Ives*, 6 Cow., 193); (3.) That the limitation of the statute applies as well to accounts between merchants as others, notwithstanding the exception (*Barber v. Barber*, 18 Vesey, 286). It has, therefore, been supposed better to express the actual state of the law in the language of the courts than to retain a phraseology which is incorrect in its terms and leads to misconstruction."

The Revised Statutes, so far as I can discover, produced no change in the decisions in this State; and after they took effect, the law was expounded as it had been before: (*Green v. Ames*, 14 N. Y., 225.)

The law as contained in the Revised Statutes remained in force until the Code, by which (section 95) it was provided as follows: "In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side."

The change in the phraseology was again, it is believed, not intended to work any change in the law. So say the codifiers, in a note to that section, in their original report to the Legislature. The only material change are the words "where there have been reciprocal demands between the parties," and these words they say were introduced "to obviate the obscurity in which the existing statute has been involved by loose expressions on the part of the courts, and to confine it to what is undoubtedly its true construction." And in the same note they speak of the accounts contemplated by this section as "mutual, open and reciprocal accounts," and say that the object of the provision, as contained in the Revised Statutes, as construed by the courts, was "to require that the accounts should be reciprocal in order to found a presumption in favor of items beyond six years;" and they further say that "to put an end, if possible, to all doubt on the subject, the most explicit language is used in the section proposed."

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The words as to reciprocal demands, introduced into the section of the Code, are frequently met with in decisions made prior to the Code. In the case of *Coates v. Harris* (Bull. N. P., 150), DENNISON, J. held that "the clause in the statute of limitations about merchants' accounts extended only to cases where there were mutual accounts and reciprocal demands between two persons;" and that is the earliest case I have found where the phrase "reciprocal demands" is used. It was there used simply to mean that the account must consist of items upon both sides, debit and credit. In *Coster v. Murray* (5 Johns. Ch., 522), the chancellor used the phrase in the same sense, as follows: "In the present case there was no account current between the parties. There are no mutual and reciprocal demands. The demand is all on one side." And it was also used in the same sense in *Edmondstone v. Thomson* (15 Wend., 554); *Belles v. Belles* (7 Halstead, 339); *Gulick v. The Turnpike Co.* (2 Green, 545); and in *Ingram v. Sherard* (17 Serg. & Rawle, 347). These cases in New Jersey and Pennsylvania were under statutes similar to that of James I. In Angell on Limitations, 135, it is said that "the rule that items within six years draw after them other items beyond that period is by all the cases strictly confined to mutual accounts, or accounts between two parties, which show a reciprocity of dealing;" at page 137, that "there must be a mutual, or as it is expressed, an alternate course of dealing;" at page 156, that the account "must be current, and mutual or reciprocal;" and at page 160, that "the account must be a mutual or reciprocal one consisting of debts and credits."

It will thus be seen that the phrase "reciprocal demands" is not new in the Code, and that it really means no more than was before meant by mutual accounts. It was introduced simply to settle definitely that there must be an account of mutual dealings,—not an account of items only upon one side, or an account of items upon one side upon which there had been simply payments not within six years upon the other side. It was intended to settle for ever such

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questions as were raised in the cases of *Kimball v. Brown* (7 Wend., 322) ; *Edmondstone v. Thomson* (15 id., 554), and *Hallock v. Losee* (1 Sand. Sup. Ct. R., 220).

A payment generally upon an account within six years will take the whole account out of the statute, and it may be that it would make no difference whether the payment was in money or goods. But where goods are delivered by a debtor to his creditor who has an account against him, it will not be presumed that they were delivered in payment. Before they can be held to have been so delivered, there must be proof that it was so intended, and that both parties so understood it. An account of items upon one side and payments merely upon the other, is not a mutual account. The payments do not, in such case, enter into the account. They are at once applied and reduce the account. Such was the case of *Warren v. Sweeney* (4 Nevada, 101), to which our attention has been called. There an article of personal property was delivered by a debtor to his creditor, who had an account against him, expressly as payment.

Where there are mutual accounts between two persons, it is always the understanding that the account upon one side shall off-set that upon the other, and in law the debt due from the one to the other is only the balance left after the application in reduction of the accounts on the opposite side. In any form of action the recovery can only be for the balance. The very theory upon which this statute is based is that the credits are mutual, and that the account is permitted to run with the view of ultimate adjustment by a settlement and payment of the balance ; and this theory is recognized in the statute, as it mentions an action "brought to recover a balance due" upon an account. The action need not be in form to recover such balance, if such be its purpose or legal effect : (*Penniman v. Rotch*, 3 Metcf., 216.) In Angell on Limitations, 136, it is said : "Mutual accounts are made up of matters of set-off. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts.

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A natural equity arises when there is an existing debt on one side which constitutes a ground of credit on the other ; or where there is an express or implied understanding, that mutual debts shall be a satisfaction or set-off *pro tanto* between the parties." In *Abbott v. Keith* (11 Vt., 525), REDFIELD, J., said : " In ordinary cases of mutual dealings no obligation is created in regard to each particular item, but only for the balance. And it is the constantly varying balance which is the debt." In *Hodge v. Manley* (25 Vt., 210), it is said : " It has uniformly been held that distinct and different items of charge, in an open and mutual account, do not constitute separate claims ; but that the claim or debt is found in the balance of the account ; and that it is the balance only that constitutes the claim of the party to whom it is due." And in *Trueman v. Fenton*, 1 Smith's Lead. Cases (H. & W.'s Notes), 966, it is said : " When men deal with an express or implied agreement that what each sells or delivers shall, instead of giving rise to a demand payable at once, stand as a payment or off-set for what has been or may be received from the other, their liability will be limited to and depend upon the balance as finally disclosed, and the statute will not begin to run until the date of the last item."

Here the goods delivered on behalf of the defendant were delivered in the way contemplated by these authorities. It was plainly understood that they were to enter into the account between the parties, to be adjusted when plaintiff's account should be settled. It is quite absurd and unnatural to suppose that the defendant intended that these small items should be treated and considered technically as payments upon plaintiff's account. That would have been contrary to the ordinary and usual way of dealing in such cases. His direction was that they be taken to the plaintiff to be applied upon his account. Applied how ? By a credit in the ordinary way customary in such cases. The plaintiff was to credit them on the opposite side of his account, so that in any future settlement between the parties, the defendant could have the benefit of them. In legal effect

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they were sold to the plaintiff, the price of them to be credited on the account. It is true that the defendant could not have sued and recovered against the plaintiff for these items. But that was so simply because the plaintiff did not owe him anything. But suppose the defendant had in the same way delivered goods to the plaintiff, until the balance was in his favor. Would it then be denied that he could have sued and recovered against the plaintiff? It has never been decided that in order to make an account of mutual or reciprocal demands, each party must have, as claimed by the learned counsel for the appellant, a cause of action against the other for his side of the account. There is but one cause of action in such case, and that is for the balance. But were it not for the account on the opposite side, each party would have a cause of action for the items of his account.

In *Chambers v. Marks* (25 Penn. St., 296), Judge BLACK using language which might be applied to this case, said: "This was a suit for a balance on book account. The plaintiff's book showed several credits within six years, and it was proved, moreover, that the items of credit were delivered on account and credited agreeably to the defendant's request. The parties must settle as if the statute of limitations had never been passed." In *Norton v. Larco* (30 Cal., 126), the defendant being indebted to the plaintiffs on account, delivered to them an article of personal property, for which they gave him credit at a valuation agreed on; and it was held that thereby the account between the parties became a mutual, open and current account of reciprocal demands.

I will now notice, so far as deemed important, cases to which our attention was called on behalf of the defendant. In *Gold v. Whitcomb* (14 Pick., 188), as stated in the head note, "a shopkeeper's account containing charges of articles sold to the defendants, some of them within six years before action brought, and also containing credits given more than six years before action brought, is not an account current or a mutual account, so as that the charges within the six years should draw the previous charges out of the operation of the

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statute of limitations." The case is but briefly reported, without any opinion of the court. It does not appear what the items of credit were. They must have been payments of money. If not, the case is opposed to the undoubted law. In *Lowber v. Smith* (7 Barr. [Penn.], 381), the plaintiff, a powder manufacturer, sued the defendant to recover upon an account for powder, most of which was beyond six years, but in which he had credited the defendant for saltpetre and brimstone; and he claimed that these credits saved the whole account from the bar of the statute. Two witnesses, who were in the employ of the defendant, testified that they never knew of a purchase of powder by the defendant of the plaintiff, as an ordinary transaction, but that it was always an exchange for saltpetre and brimstone, or these articles were delivered to the plaintiff to be worked up and returned in powder. The trial judge held, as matter of law, that these were mutual accounts between the parties. This was held error in the court of review, the decision there being that the evidence of the defendant tended to show that there was an exchange of one article for another, or in other words, a payment of one article by the delivery of another. The point decided was that an account is not rendered mutual by credits therein of payments either in money or property. But ROGERS, J. used language not sanctioned by authority, as follows: "A mutual account is when each has a demand or right of action against the other, as, for example, when A. and B. dealing together, A. sells B. an article of furniture, or any other commodity, and afterwards B. sells A. property of the same or a different description; this constitutes a reciprocal demand, because A. and B. have a demand or right of action against each other;" and he said this is not so when the sale is only by one to the other, whether it is to be paid for in cash or in kind; and that the manner of payment could surely make no difference. This case is criticized in, 1 Smiths Leading Cases (H. & W's Notes) 967, and the reasoning of the judge who wrote the opinion is shown, I think, clearly to be unsound. The case of *Adams*

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v. *Carroll* (85 Penn., 209), is one where all the items of the account were upon one side and only credits for money payments upon the other side; and it was properly held not to be a mutual account. It is in reference to such an account that the improper language is again used that "to constitute mutual accounts there must be mutual demands. Each party must have a demand or right of action against the other." These Pennsylvania decisions were made under a statute, the language of which is like that in the statute of James I, and the *dicta* which I have quoted are not sanctioned by any English or American authority construing that statute. Similar language is used by HOFFMAN, J. in *Peck v. The N. Y. and Liverpool U. S. Mail S. S. Co.* (5 Bosw. 226); a case where all the items were upon one side and simply money payments upon the other side.

Without referring to more authorities, I think it may safely be said that there is no decided case in this country or England which sustains the contention of the defendant; and that the phrase "reciprocal demands" has introduced no new element into our statute of limitations. It may be admitted that to constitute a mutual account of reciprocal demands, a defendant, when sued, must have an account against the plaintiff, which he can interpose as a set-off to the extent thereof. It is not needful, however, that each party shall have an independent cause of action against the other. The cause of action upon such an account is really in law for the balance due, and that party only is debtor against whom the balance is found, and that rule, as before stated, is recognized in the language of the statute. Suppose none of the plaintiff's account had been barred by the statute, and he had sued the defendant to recover the whole of it, ignoring the credits. Can it be doubted that, upon the facts disclosed in the evidence, he could have interposed his account for the butter and eggs as a set-off? To hold otherwise and sustain the contention of the defendant, would be to substantially nullify the statute of limitations in actions brought to recover upon accounts, as such accounts generally arise and exist

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under circumstances similar to those which appear here. That is, goods are delivered upon the one side to off-set or to be credited upon goods delivered upon the other side, the account being permitted to run for mutual convenience, and the balance to be paid by the party against whom, upon final adjustment, it shall be found to exist.

I conclude, therefore, that the referee committed no error in his decision as to the statute of limitations; and I will now proceed to examine other exceptions to which our attention has been called.

Defendant's son, Jonathan, was sworn as a witness for the plaintiff; and he testified that from November, 1855, to November, 1863, the principal articles of clothing and groceries for his family were obtained of the plaintiff, and that he often went himself and often sent others to plaintiff's store for goods. He was then asked this question: "State, as well as you can, the quantity and amount of the articles thus purchased at Green's store during these years, which were had and used in your family." This was objected to on the part of the defendant as immaterial and incompetent, and on the ground, as to goods not obtained by himself, that the witness had no knowledge as to where they came from. The objection was overruled, and the witness answered: "I should think they would amount to from \$700 to \$800; perhaps more." The question was not objectionable. It called for facts only within his personal knowledge; and if the answer went further than the question, that was not objected to.

There was proof, by the plaintiff as a witness, that the defendant had several times looked over his account books, and particularly that he did so in June, 1863, and that he then examined the account charged to his son; and the plaintiff testified that he had a statement of the account which was looked over by the defendant, one paper containing computation of interest, and another containing the whole account with interest. These papers were objected to separately as immaterial and incompetent, and on the

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ground that the alleged indebtedness was not sufficiently proved, and also that the principle upon which the interest was figured was incorrect. The objection was overruled and the papers were received. In this there was no error. The paper as to the computation of interest need not be noticed, as no error is alleged as to the allowance of interest. The other paper, as I understand it, was a paper containing a statement of the account which the defendant had examined in the books. It was certainly competent to place the items thus examined before the referee. Strictly the items should have been read from the books. But this was not called for by the defendant, and the paper was not objected to as secondary. It seems to have been taken as of the same force as if the items had been read from the books.

Other exceptions have been examined, but they are not deemed of sufficient importance to require particular notice here.

The judgment should be affirmed, with costs.

All concur, except CHURCH, Ch. J., not voting.

Judgment affirmed.

WILLIAM J. BEST, as Receiver, etc., Respondent, v.
NICHOLAS THIEL et al., Appellants.

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Defendant T. was one of the trustees of a savings bank, to make up a deficiency in the assets of the bank, caused by a loss upon a loan made by it, he executed a mortgage to H., who assigned it to the bank. In an action to foreclose the mortgage, *held*, that T. in executing it did not thereby become a surety or obligor for moneys loaned by the bank, within the meaning of the provision of the act of 1875, in relation to savings banks (§ 21, chap. 371, Laws of 1875), which prohibits a trustee from becoming such surety or obligor; and so, that the mortgage was not invalid as violative of that provision.

The claim was made that the trustees of the bank were personally liable for the deficiency. The superintendent of the banking department informed them that they were so liable, and that this liability would be enforced unless they made up the deficiency, and upon his requirement the mortgage was executed. T. set up want of consideration as a defense. *Held*,

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untenable. 1st. The seal was presumptive evidence of a consideration, which presumption was not clearly overcome. 2nd. T. was estopped from denying the legal validity of the mortgage, as it was with his knowledge and assent reported to the bank department and represented to the depositors of the bank as a portion of its assets, and upon the strength thereof and other similar securities, the bank was permitted to continue its business.

(Argued November 12, 1879; decided November 18, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought by plaintiff as receiver of the German Savings Bank, of the town of Morrisiana, to foreclose a mortgage executed by defendant Thiel and wife.

The facts appear sufficiently in the opinion.

II. E. Sickels, for appellant. The consideration for the bond and mortgage, if any existed, was illegal, and they were therefore void. (Laws 1875, chap. 371, § 21; 2 R. S., § 39; 2 J. Ch., 377; *Vallet v. Parker*, 2 Wend., 615; *Rockwell v. Charles*, 2 Hill, 499.) The receiver was in no more favorable position than the bank; he stood in the relation of an assignee. (*Greene v. Warwick*, 64 N. Y., 221; *Shafer v. Reilly*, 50 id., 61; *Bush v. Lathrop*, 22 id., 535; *Trustees, etc. v. Wheeler*, 61 id., 88.)

Frederick Smyth, for respondent. The bond and mortgage being under seal the law will presume a consideration. (3 R. S. [6th ed.], p. 672, § 124; *Torry v. Black*, 58 N. Y., 186; *Petrie v. Barckley*, 47 id., 653; *Gray v. Barton*, 55 id., 68; *Calkins v. Long*, 22 Barb., 98.) Defendant's liability as trustee, of itself furnished a sufficient consideration for the delivery of the bond and mortgage in question to the bank. (*Trustees of Hamilton Col. v. Stewart*, 1 N. Y., 581; *Barnes v. Perrine*, 12 id., 20; *Richmondville Sem'y v. McDonald*, 34 id., 379.) The bank department having

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relied upon the statements or reports made to it by the appellant, that the bond and mortgage were valid securities, and relying upon such statements permitted the bank to continue its business; it would, therefore, be contrary to public policy and good morals to permit the appellant now to claim that the security was without consideration and void. (*White v. Leslie*, 54 How. Pr., 394; *Dinkelspiel v. Franklin*, 7 Hun, 339; *Farrar v. Walker*, 3 Dillon, 506.)

EARL, J. This is an action to foreclose a mortgage executed by the defendant and his wife to one Hall and by him assigned to the savings bank of which the plaintiff has become the receiver. The defendant was one of the trustees of the bank, and there was a deficit in the assets of the bank to the amount of \$70,000, and defendant executed this mortgage and had it assigned to the bank, for the express purpose of making up this deficit and thus enabling the bank to go on with its business.

The learned counsel for the appellant seeks the reversal of this judgment upon two grounds which I will briefly notice. He claims that the mortgage was given in violation of section 21 of chapter 371 of the Laws of 1875, and that therefore it is illegal and void. That section prohibits a trustee of such a corporation from becoming a surety or an obligor for moneys loaned or borrowed of such corporation. It is a sufficient answer to this claim that defendant did not become a surety or obligor for any money loaned. No money was loaned upon the faith of his mortgage. The bond and mortgage were executed to make up a deficiency in the assets of the bank, which deficiency was caused by a loss upon a loan made by the bank a long time before the mortgage was given.

The further claim is made that the mortgage was without any consideration and therefore void. To this claim there are two answers. First. The mortgage was under seal and the seal was presumptive evidence of a consideration: (3 R. S. [6th ed.], 672, § 124; *Gray v. Barton*, 55 N. Y., 68;

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Torry v. Black, 58 id., 186.) This presumption was not clearly overcome. The defendant was one of the trustees of the bank, and there was a claim that he was personally liable for the deficiency. The bank superintendent informed the trustees that they were all so liable, and that unless they made up this deficiency, their individual liability would be enforced. It was upon this requisition of the superintendent that the mortgage was given; and if given to discharge a personal liability, it was not without consideration. It is true that there is no finding that there was such personal liability for the deficiency. Neither is there a finding that there was not. The claim of the liability was made by one in authority, and in pursuance thereof the securities were given. It is sufficient to say that the presumption of a consideration was not clearly overcome. Second. The defendant is estopped from denying the legal validity of the mortgage. It was given expressly to make up the deficit in the assets of the bank and to enable it to go on with its business. It was reported to the banking department as a portion of the assets and was in effect represented to the depositors of the bank as a portion of the assets, and all this was done by the defendant and with his knowledge and assent. It was in consequence of this and other securities given by other trustees, that the superintendent of the banking department, acting officially for the public and all the creditors of the bank, permitted the bank to continue its business. It was in reliance upon this and the other securities given, that depositors were induced to make and leave deposits in the bank; and hence, upon the clearest principles of justice and morality, the defendant should be estopped from denying the validity of this mortgage: (*Farrar v. Waiker, Assignee*, 3 Dillon, 506, n.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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**MARY A. MUMPER, as Administratrix, etc., Appellant, v.
BENJAMIN F. RUSHMORE, as Sheriff, etc., Respondent.**

Notwithstanding a levy under an execution upon his personal property, the judgment debtor remains owner; and can convey title, subject to the lien created by the execution.

An assignee for the benefit of creditors, of the debtor, acquires a title subject to such lien, good against all persons until the assignment is impeached for fraud.

Where the property is in the possession of the sheriff at the time of the assignment, the transaction is not within the provision of the statute of frauds (2 R. S., 135, § 5), which requires an immediate delivery of goods sold; that applies only to a sale of goods in the vendor's possession or under his control.

Defendant, in January, 1877, as sheriff levied under an execution upon certain goods belonging to P., the judgment debtor, and took possession. On February 3d, 1877, P. made a general assignment for the benefit of creditors. An attachment against the property of P. was issued to defendant, February 6th. He sold sufficient of the property to satisfy the execution, and then, upon demand of the assignee and refusal of the attachment creditors to indemnify, delivered the residue to the assignee and returned *nulla bona* to the attachment and the execution issued upon judgment in the attachment suit. In an action for a false return there was evidence that defendant assumed to levy under the attachment; *held*, that by surrendering the property without calling a jury to pass upon the title, as prescribed by the statute (2 R. S., §§ 4, 10), defendant assumed the burden of showing that the property was not subject to the attachment; but that the facts established that defense; and, being undisputed, the complaint was properly dismissed.

(Argued November 12, 1879; decided November 25, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on trial. (Reported below, 14 Hun, 591.)

This action was brought against defendant as sheriff of the county of Queens, for an alleged false return to a warrant of attachment issued to him, against the property of one Peck, and also to the execution issued upon the judgment in the attachment suit.

Statement of case.

The attachment was issued to defendant February 6th, 1877. At that time he had in his possession a large amount of personal property of said Peck, which had been levied upon January 8, 1877, under and by virtue of an execution against Peck. On February 3d, 1877, Peck made a general assignment of all his property for the benefit of creditors. Defendant sold under the execution February 14, 1877. After he had sold sufficient to satisfy the execution, the assignee demanded possession of the residue and upon refusal of the attaching creditors to indemnify defendant turned over the property to said assignee, and made return of *nulla bona* to the attachment and the execution.

Frank Crooke, for appellants. There being no delivery of the chattels by Peck to the assignee, and no change of possession, no title passed to him. (2 R. S., 136, § 5.) The assignee parted with no value, and was not a purchaser for a valuable consideration. (*Curtis v. Leavitt*, 15 N. Y., 195; *Van Heusen v. Radcliff*, 17 id., p. 580; *Slade v. Vanvechten*, 11 Paige, 21; 2 R. S., 136, § 5; *Randall v. Parker*, 3 Sand., 69; 4 Hill, 271; 6 id., 628.) Plaintiffs as creditors attaching property in the possession of the debtor or his bailee, acquired a specific lien thereon, and are entitled like a judgment creditor, to impeach the colorable title of third persons. (*Frost v. Mott*, 34 N. Y., 253; *Rinckey v. Stryker*, 26 How., 75; 31 N. Y., 45; *Hall v. Stryker*, 27 id., 596.) The defendant having attached Peck's property, then in his (defendant's) hands under the levy in favor of the bank, it was his duty to safely keep the same, or so much thereof as was not sold under the bank's execution. (Code, 231, 232; *Learned v. Vredenburg*, 7 How., 379; Rev. Stat., pp. 4 and 5; *Scheit v. Baldwin*, 22 How., 278; *Thompson v. Culver*, 24 id., 826; *McKay v. Harrower*, 27 Barb., 463; [app'd, *Smith v. Orser*, 42 N. Y., 132]; S. C., 43 Barb., 187.) The sheriff had no right to require indemnity under the attachment after claim made, until an inquisition found the title to be in the claim-

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ant. (2 R. S., 5, §§ 10, 11; 3 Hill, 386; *Batchellor v. Schuyler*, 4 N. Y., 173.)

Samuel Hand, for respondent. By the assignment dated February 3d, 1877, and the acceptance of the trust by the assignee, all of the property of the assignor became vested in the assignee subject to the levy of the sheriff under the Brooklyn bank execution. (*Syracuse R. R. Co. v. Collins*, 57 N. Y., 641; *Thrasher v. Bentley*, 59 id., 649; *Brennan v. Wilson*, 71 id., 502.) The sheriff had only a special property in the goods levied upon—the general property being in the debtor until the execution was satisfied. (*Pierce v. Kingsmill*, 25 Barb., 631.) Even if the sheriff attached all of the property of Peck, he was justified, when he discovered that the property was in fact the property of the assignee, to return the attachment and execution *nulla bona*. (*Blovin v. Bleakley*, 23 How., 124; 1 Wend., 92; 22 id., 622.) It was entirely competent for plaintiffs to waive the calling of a jury, and this was done by their refusal, without condition, to execute a bond. (*Chamberlain v. Biller*, 18 N. Y., 115.) The sheriff's return of no property to the attachment, and of *nulla bona* to the execution issued upon the judgment under the attachment, is *prima facie* evidence of the facts stated. (*Bechstein v. Sammis*, 17 Supt. Ct. R., 585.)

DANFORTH, J. There is no ground for this appeal. Notwithstanding the levy, the judgment debtor remained owner of the property and could convey the title subject only to the lien created by the execution. And this was so although the sheriff levied on all the property in question, as the evidence tends to show he did. It is true the assignee is not a purchaser for value within the meaning of the statute which protects the title of a *bona fide* purchase made before actual levy, (2 R. S., 365, § 17), but he nevertheless acquired a good title subject to the payment of the debt due the execution creditor, or to the sheriff's lien for the collection of the debt, and one which, until impeached for fraud, is

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good against all persons. (*Grant v. Chapman*, 38 N. Y., 293.) Moreover, as the property was in the sheriff's hands and not in the possession of the debtor, the transaction was not within the purview of the statute (2 R. S., p. 136, § 5) which requires an immediate delivery of goods sold, for that applies only to a sale made by a vendor of goods, etc., in his possession or under his control. It is contended, however, that as the attachment came to the sheriff's hands after the levy on the execution and before the sale, there was a constructive levy notwithstanding the assignment, and this position is supposed to be fortified by *Slade v. Van Vechten* (11 Paige, 21). But it is not. The executions therein considered were all issued prior to the transfer, and the court held that the lien acquired by them, although no levy was made in fact until after the assignment, was superior to the assignee's title. This rule is well settled, *Warner v. Paine* (3 Barb. Ch'y., 630); *Birdseye v. Ray* (4 Hill, 158); *Ray v. Birdseye* (5 Denio, 619), but does not aid the plaintiff, for the facts on which it rest do not fit his case. There is indeed, evidence that the sheriff assumed to levy the attachment, and it is therefore contended by the appellant that he should have kept the levy good and not surrendered until a jury had passed upon the claimant's title, as is provided by section 10, 2 Revised Statutes, p. 4. Had the defendant followed this statute he would have been protected against this action. By not doing so, he assumed the burden of showing, when sued, that the property was not subject to the attachment, *Denton v. Livingston* (9 J. R., 96); *Magne v. Seymour* (5 Wend., 309) for in that case he had a right to release it.

It follows from the conclusion reached upon the proposition first considered, that the facts existed on which the defense might rest, and as they were undisputed, the trial court properly dismissed the complaint.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

CHARLES B. WESTBROOK, Appellant, v. WILLIAM GLEASON, Impleaded, etc., Respondent.

79	23
137	339
79	23
160	312

To enable a subsequent purchaser to assail a prior unrecorded mortgage under the recording act (1 R. S., 756, § 1), it is incumbent upon him to show not only that he was a *bona fide* purchaser for value without notice, but that his conveyance was first recorded.

Where a junior mortgagee, with notice of a prior unrecorded mortgage, assigns his mortgage to a *bona fide* purchaser for value, who has no notice, the assignment is the "conveyance," within the meaning of said act (1 R. S., 762, §§ 37, 38), and such assignee is entitled to preference, only in case he records his assignment before the first mortgage is recorded. (DANFORTH, J., dissenting.)

Jackson v. Van Valkenburgh (8 Cow., 260), distinguished.

It seems, that where, at the time of the execution of a mortgage, A., a third party, is in possession of the mortgaged premises, under an executory contract for the purchase thereof, and has made improvements thereon, and subsequently, and before the mortgage is recorded, A. takes a conveyance, in good faith, without knowledge of the mortgage, giving his bond and mortgage for the whole of the purchase-price, and the deed and subsequent mortgage are recorded before the prior mortgage, the title of A. is superior to the prior mortgage; and a purchaser upon foreclosure of the mortgage so given by A. takes all his title, and so takes the premises freed from the lien of the prior mortgage.

In such case, for the purpose of determining the question of the lien of the prior mortgage, the legal title of A. will be considered as relating back to his equitable title, and is thus freed from the lien; but if by accepting a deed A. loses his equitable rights as vendee in possession under his contract, then he is protected by the recording act, as by parting with such rights he becomes a purchaser for value, and is entitled on that ground to priority, although he paid no portion of the purchase-money.

Westbrook v. Gleason (14 Hun, 245), reversed.

(Submitted May 22, 1879; decided November 25, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming so much of the judgment herein as held that defendant Gleason had acquired a title to fifty-five acres of the lands, to foreclose a mortgage whereon this action was brought, superior to said mortgage. (Reported below, 14 Hun, 245.)

The facts are fully set forth in the prevailing opinions.

Statement of case.

M. Schoonmaker, for appellant. The defendant Gleason, as assignee of McKoon, the mortgagor, took the mortgage under the assignment subject to the same equities under which the same was held by his assignor; and, as to the mortgage in his hands, the plaintiff's mortgage had priority. (*Crane v. Turner*, 67 N. Y., 439; *Schaffer v. Reilly*, 50 id., 61; *Greene v. Warwick*, 64 id., 220; *Delancey v. Stearns*, 66 id., 157; *Trustees Un. College v. Weaver*, 61 id., 88; *Davis v. Beckstein*, 69 id., 440.) Securing the payment of the purchase by a mortgage on the premises conveyed, is not a valuable consideration within the requirements of the recording act. (2 Fonblanque Eq., 149, note; *Jewell v. Palmer*, 7 J. Chy., 68; *Ells v. Tourley*, 1 Paige Chy., 284; *Whitbeck v. Kain*, id., 208; *Demott v. Stanley*, 3 Barb. Chy., 403; *Weaver v. Barden*, 49 N. Y., 286; *Cary v. White*, 52 id., 138.) After the conveyance by McKoon to Jones, and the execution of the mortgage back by Jones to McKoon, there were no existing equities in Jones under the contract of purchase; they were all absorbed, lost and merged into the legal title. (*James v. Morey*, 2 Cow., 247.) Any grantee of the premises from Jones, therefore, after the conveyance received by him from McKoon, would be a purchaser of the McKoon title, and subject to the provisions of the recording act in regard to the priority of conveyances previously recorded. (1 R. S., 756, § 1; id., 762, § 37; *James v. Morey*, 2 Cow., 248, 305.)

William Gleason, respondent in person. The defendant Gleason's equities are superior to the plaintiff's upon the facts of the case. His mortgage is entitled to precedence under the recording acts. (*Cruin v. Turner*, 7 Hun, 357; 46 N. Y., 632; 31 id., 399; 55 id., 46, 47.) When Jones' deed was put on record he became entitled to hold as against plaintiff's unrecorded mortgage under the recording act. (*Thurman v. Anderson*, 30 Barb., 623-625; *Hetzel v. Barber*, 6 Hun, 541; 55 N. Y., 47; *Jackson v. Campbell*, 19 J. R., 283; *Fort v. Burch*, 6 Barb., 65; *Fisk v. Potter*, 2

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Keyes, 74, 75, 78; 46 N. Y., 325, 329-332; *Dickinson v. Tillinghast*, 4 Paige, 220, 221; *Brown v. Volkening*, 64 N. Y., 82; 2 J. R., 510, 522, 524; 1 J. Chy., 398; *Delaney v. Stearns*, 66 N. Y., 162; 5 id., 66; 8 Cow., 260; 1 J. Chy., 394, 398.) Recording Schoonmaker's mortgage in 1869 was no notice to Jones and Gleason. (*Reed v. Mabble*, 10 Paige, 410; *Moyer v. Hinman*, 13 N. Y., 180-194; *Parks v. Jackson*, 11 Wend., 442; *Trustees, etc. v. Wheeler*, 61 N. Y., 89; *Young v. Guy*, 5 W. Dig., 399; 1 Barb., 392.) The deed and mortgage of Jones relate back to the contract, and in part are vitalized by it. (2 J. R., 511, 520; 1 J. Cas., 81; 3 Cow., 80.) Under the recording act any valuable consideration paid or furnished to the vendor makes the purchaser, without notice, a *bona fide* purchaser for a valuable consideration. The amount is immaterial. (*Wood v. Chapin*, 13 N. Y., 509; 7 Cow., 360; id., 518, 519, 523; id., 521; 2 Kent's Com., *465; Chitty on Cont. [5th Am. ed.], 29, 30; Story on Cont., § 429-431; 2 Bl. Com., *444; *Gilchrist v. Gouge*, Alby. Law Journal, April 5, 1879, p. 276; *Seward v. Jackson*, 8 Cow., 430; *Pickett v. Benson*, 29 Barb.; *Cary v. White*, 52 N. Y., 138-142.) Gleason was a *bona fide* purchaser for a valuable consideration, and upon the mortgage assigned to him being recorded, he was, under the recording act, a purchaser whose lien was prior to the plaintiff's. (3 R. S., 45, § 1 [5th ed.]; id., § 69; 63 N. Y., 269-276; 11 J. R., 534; 2 Lans., 475-476.) It is of no consequence whether Gleason ever recorded his assignment or not, unless McKoon should convey the same bond and mortgage to a *bona fide* purchaser, and the latter should put such second fraudulent assignment on record. (2 Barb. Chy., 83-84; 3 Keyes, 174-178; *Crane v. Turner*, 67 N. Y., 437.) Gleason being a *bona fide* purchaser for value was not affected by notice or bad faith on the part of McKoon. (8 Cow., 260; 13 N. Y., 509, 518; 46 Barb., 211; 2 Hill, 650, 654; 4 Hun, 705; 3 id., 576; 9 Paige, 315, 318; 8 Wend., 620; 8 J. R., 137; 6 Paige, 322, 329; 12 J. R., 652.) The word purchaser as to recording assignments, refers to the

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purchaser of the assigned mortgage, and not to some other purchaser of some other mortgage upon, or estate in the equity of redemption. (1 Abb. Ct. App. Decs., 295, 302; 3 Keyes, 174; 42 N. Y., 334, 348; 64 id., 220, 227.)

EARL, J. This is an action to foreclose a mortgage upon about two hundred and seventy-five acres of land, situated in Delaware county, which was executed by Dennis D. McKoon to Marius Schoonmaker, and by him assigned to the plaintiff. The facts, so far as they are material to the decision of the question submitted to us, were found at the Special Term of the Supreme Court as follows: Prior to September, 1856, Nicholas Elmendorf claimed to own the mortgaged lands; and he entered into an executory contract with Samuel Inman for the sale to him of fifty-five acres thereof; and Inman entered into possession of such parcel and made some improvements thereon. Subsequently, on the 24th day of September, 1856, the sheriff of Delaware county, by virtue of a sale upon execution issued upon a judgment recovered against Elmendorf, duly conveyed the mortgaged lands to Samuel Gordon and others, by a deed recorded September 26, 1856. On the 18th day of March, 1857, the grantees in that deed conveyed the same lands to the plaintiff in this action, by a deed recorded on the 4th day of April thereafter. On the 3d day of April, 1862, the State comptroller, by virtue of a tax sale, conveyed to the plaintiff the parcel of fifty-five acres and other parcels of land covered by the plaintiff's mortgage, by a deed recorded on the 2d day of June thereafter. Some time after the lands had been conveyed to the plaintiff (the precise time not appearing) Inman surrendered to him his contract for the fifty-five acres and received from him a new contract for the same; and he continued in the possession of that parcel until he sold the same, by a written executory contract, to Samuel Jones, who entered into possession thereof and remained in possession, making some improvements thereon, until October 10, 1870. The date of this contract with Jones does not

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appear. On the 1st day of June, 1866,—which was probably after the contract with Jones — Inman conveyed to the mortgagor, McKoon, all his interest in the fifty-five acres, by a deed recorded July 31, 1867. On the 13th day of June, 1868, the plaintiff conveyed to McKoon, by quitclaim deed, for a consideration, as expressed therein, of \$500, the two hundred and seventy-five acres of land: and that deed was recorded November 28, 1868. On the same day of June, Marius Schoonmaker executed and delivered to McKoon a warranty deed of the same lands, for a consideration, as expressed therein, of \$1,500, which deed was recorded February 24, 1873. For the purpose of securing the consideration of these two conveyances, McKoon, on the same day, executed the mortgage for \$1,500, which this action was commenced to foreclose; and this mortgage was recorded January 8, 1869. On the 27th day of October, 1868, Schoonmaker assigned this mortgage to the plaintiff, by an instrument in writing duly executed, acknowledged and delivered, but never recorded. On the 1st day of October, 1868, McKoon conveyed the fifty-five acres to Jones, for the consideration of \$500 by a deed recorded December 1, 1868; and at the same time, to secure the purchase money and the sum of \$200, which Jones owed McKoon, the former executed to the latter a mortgage upon the same land for the sum of \$700, which mortgage was recorded on the same day with the deed. Jones took his deed in good faith, believing that he was acquiring an unincumbered title to the land. On the 2d day of December, McKoon for value received sold and assigned that mortgage to the respondent, Gleason, who put his assignment upon record March 7, 1870. Gleason purchased the mortgage in good faith, believing it to be a first lien upon the lands, after having searched the records and finding no incumbrance there. Sometime prior to July 29, 1870, Gleason commenced an action to foreclose his mortgage, and on that day recovered a judgment of foreclosure against Jones and others, the plaintiff, however, not being a party. Gleason became

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a purchaser of the fifty-five acres under that judgment, and received a deed thereof dated October 10, 1870, which was recorded May 4, 1877. It does not appear how McKoon came to take a quit-claim deed of Westbrook, and a warranty deed of Schoonmaker, of the same lands, at the same time; and it does not conclusively appear which of these grantors had the true title to the land. The title was evidently recognized as being in one or both of these grantors, and the mortgage was given to secure the consideration of both conveyances.

Upon these facts the question to be determined is which has priority of lien upon the fifty-five acres, plaintiff's mortgage, or the Jones mortgage assigned to Gleason? I think the courts below were in error in answering this question in favor of the Jones mortgage.

To repeat a few facts: The deed to Jones and the mortgage from Jones to McKoon were recorded December 1, 1868. The plaintiff's mortgage was recorded January 8, 1869. The assignment of the Jones mortgage to Gleason was recorded March 7, 1870, more than a year after plaintiff's mortgage was upon record.

The deed to Jones of the fifty-five acres did not give him a title free from plaintiff's mortgage, because, although he purchased in good faith and his deed was first recorded, he was not, within the meaning of the recording act, a purchaser for a valuable consideration. He paid nothing, and simply gave his bond and mortgage to secure the entire consideration payable at a future day. A purchaser for a valuable consideration, within the meaning of that act, is one who has paid the consideration of the conveyance or some part thereof, or has parted with something of value upon the faith of the conveyance. (3 Wash. on Real Property [3d ed.], 289; *Tourville v. Naish*, 3 P. Williams, 306; *Story v. Lord Windsor*, 2 Atk., 630; *Hardingham v. Nicholls*, 3 id., 304; *Webster v. Van Steenbergh*, 46 Barb., 211; *Weaver v. Barden*, 49 N. Y., 286; *Delancey v. Stearns*, 66 id., 157; *Dickerson v. Tillinghast*, 4 Paige, 215.)

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There is nothing in Jones' prior relation to the land which improves his position. It does not appear that either he or Inman had paid anything upon the contracts which they held; nor does it appear to what extent they had made improvements upon the land. The contracts are not set out, and we have no information as to their terms. There is no finding that the Jones contract was in force at the time he took his deed from McKoon, or that at that time he had any valid claim to the land, or a conveyance thereof. There is no finding, and it cannot be inferred from any of the facts appearing, that the deed to him and the mortgage from him were given in performance of any prior contract. There is no allegation that they were, in Gleason's answer. The plain inference, from the lapse of time and other circumstances, is that the prior contract was either forfeited or abandoned. The mortgage was given for not only the whole purchase price, but for \$200 in addition thereto; and according to Gleason's answer, the consideration agreed to be paid for the deed was twice the amount stipulated in the contract. The Jones title, as the case is now presented to us, must therefore rest entirely upon the deed from McKoon; and for the reason above stated, that deed is subordinate to plaintiff's mortgage.

It is not disputed that the mortgage from Jones, while McKoon held it, was subordinate to plaintiff's mortgage given by himself, and of which therefore he had full knowledge. The question now to be determined is whether by the assignment of this mortgage to Gleason, the latter obtained any better position for the enforcement thereof than his assignor had.

A mortgage under our laws is a mere chose in action; and aside from the force of the recording statute, an assignee thereof—so far as concerns his right as such to enforce the same—must be treated like the assignee of any other chose in action. What the assignor could have done while owner to enforce the same he can do, and no more. He takes the precise position of the assignor. He can obtain by the assign-

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ment no greater or better right than the assignor had. While an assignee of a chose in action may now enforce the same in his own name, he must do it subject to all the defenses and equities which would have existed and affected it if the action had been in the name of the assignor, as it was originally required to be. The assignee of a mortgage takes it not only subject to all the equities existing between the parties to the instrument, but it is now too well settled to need further discussion that he takes it also subject to all equities which third persons could enforce against the assignor. (*Bush v. Lathrop*, 22 N. Y., 535; *Schafer v. Reilly*, 50 id., 61; *Trustees of Union College v. Wheeler*, 61 id., 88; *Greene v. Warnick*, 64 id., 220; *Crane v. Turner*, 67 id., 437.)

Unless, therefore, Gleason can claim some benefit from the recording statute, the priority of plaintiff's lien under his mortgage is established.

The recording statute (1 R. S., 756), provides, that "every conveyance of real estate within this State, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded." By subsequent sections it is provided that the word "conveyance" in this section shall embrace an assignment of a mortgage, and that the word "purchaser" shall embrace an assignee of a mortgage.

In order to protect a subsequent purchaser under this statute, there must be a conveyance to him in writing; and such conveyance must be first recorded. The mortgage from Jones to McKoon was not and could not become in any sense a conveyance to Gleason. That was a conveyance to McKoon, and as such was recorded. The only conveyance Gleason had was the assignment to him; and if that may be regarded as a subsequent conveyance by McKoon of an

interest in the same real estate covered by plaintiff's mortgage executed by him, then it could have preference over that mortgage only by being first recorded; and it was not first recorded. It was, in effect, so held in *Fort v. Burch*, (5 Den., 187). In that case it was decided that where a junior mortgagee, with notice of a prior unrecorded mortgage, assigns his mortgage to one who has no notice, such assignee is entitled to preference only in case he records his assignment before the first mortgage is recorded. In *Jackson v. Van Valkenburgh*, (8 Cow., 260), it was held that such an assignee is entitled to the preference, although he has not recorded his assignment. But that case was decided upon the law as it existed before the Revised Statutes, when assignments of mortgages were not authorized to be recorded. As the law was then understood, in the absence of a recording statute, if a junior grantee or mortgagee, with notice, conveyed or assigned to an innocent purchaser, without notice, such purchaser would be protected equally as if no notice had ever existed: (*Jackson v. Given*, 8 J. R., 137; *Varick v. Briggs*, 6 Paige, 323; *Fort v. Burch*, 6 Barb., 60.) This seems to have been the rule of the common law, and was said in 5 Denio, (*supra*), to be "for the prevention of fraud, whereby an innocent purchaser is protected, though he take through a tainted title." In *Varick v. Briggs*, the chancellor speaking of the common law rule, said: "If a purchaser who has notice of a prior unregistered deed or of a fraud or trust or any other previous claim upon the estate purchased by him, afterwards conveys or mortgages the property to another who has no such notice, either actual or constructive, the latter is entitled to protection as a *bona fide* purchaser or mortgagee." But since the Revised Statutes, a *bona fide* purchaser of a legal or equitable interest in real estate, from a vendor charged with notice of a prior unrecorded conveyance, can obtain a better position than his vendor only by recording his conveyance first, and thus getting priority upon the record: (2 Wash. on Real Prop., 141; *Wood v. Chapin*, 13 N. Y., 509.) But there is a further

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reason for disregarding the authority in this case of *Jackson v. Van Valkenburgh*. When that case was decided, the law holding that a mortgage for the purpose of assignment was a mere chose in action had not been as broadly laid down as now. Now, as shown above, a mortgagee cannot convey by assignment any better title or greater interest, or give any better position to a *bona fide* assignee than he himself has.

We have assumed that by the assignment of the Jones mortgage to Gleason, for the purposes of the recording statute, he took not only a conveyance of the mortgage, but a conveyance of an interest in the land; so that he became under that statute a subsequent purchaser of an interest in the land covered by the mortgage. But there is authority for holding that an assignee of a mortgage under that statute is a mere purchaser of the mortgage; and that the only purpose of recording such assignments is to regulate the relation to each other of successive assignees of the same mortgage: (*Greene v. Warnick*, 64 N. Y., 220; *Crane v. Turner*, 67 id., 437.) If this be the correct construction of the statute, then Gleason can have no benefit from the recording statute, because he is not a subsequent assignee of the same mortgage held by the plaintiff.

Plaintiff lost no right by not recording his assignment. There was no subsequent conveyance of the same mortgage; and so far as Gleason can claim to be a subsequent purchaser of an interest in the fifty-five acres, by virtue of his assignment, his conveyance was subsequent upon the record to plaintiff's mortgage: (*Purdy v. Huntington*, 42 N. Y., 334; *Campbell v. Vedder*, 1 Abb. Ct. of App. Dec., 295; *Gillig v. Maass*, 28 N. Y., 191.)

The conclusion thus reached does not work extraordinary hardship. A grantee or mortgagee of lands may always be subjected to loss by a failure to record his conveyance before the record of a prior conveyance which was unrecorded when he took his. In such cases he loses in the race of diligence which the recording statute requires. One who purchases

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mortgages always does so at his peril, like one who purchases other non-negotiable choses in action. He must inform himself accurately as to the title and value of the security he buys; and if he is deceived, he must look to the responsibility of the seller.

The judgments of the Special and General Terms, so far as appealed from by plaintiff, must be reversed and new trial granted, costs to abide event.

RAPALLO, J. The claim of the defendant to priority by virtue of the recording act has been so fully discussed in the opinions of DANFORTH and EARL, JJ., that it would be superfluous to say more upon that subject, than that I feel constrained by the language of the recording act to concur in the conclusion reached by EARL, J., that in order to place himself in a position to assail the plaintiff's mortgage on the ground that it was not recorded, it was incumbent upon the defendant to show, not only that he was a *bona fide* purchaser for a valuable consideration and without notice, but that his conveyance was first recorded. He did show that he was such *bona fide* purchaser, and he would have been protected by the statute had he taken the precaution to place his assignment upon record before the plaintiff's mortgage was recorded; but unfortunately he omitted that precaution. It is true that the failure on his part to record his assignment did not mislead or injure any one, while the failure of the plaintiff to record his mortgage did mislead the defendant, and cause him to purchase and pay for the Jones mortgage on the supposition that it was a first lien. If it were possible to construe the statute so as to protect the defendant we should feel disposed so to do. But its language is so clear as to leave no room for such a construction. His title, so far as it rests upon the rights acquired under the assignment of the Jones mortgage, cannot therefore be sustained by virtue of the recording act.

The findings of the trial judge, however, disclose other grounds upon which the defendant Gleason is, or at least

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may be, entitled to hold the fifty-five acres free from the plaintiff's mortgage.

By his purchase on the foreclosure of the Jones mortgage, the defendant became vested with all the title which Jones had, and if for any reason the title of Jones was not subject to the plaintiff's mortgage, the title of the defendant Gleason is equally free.

The findings show that in the year 1857, when the plaintiff purchased the 275 acres (of which the fifty-five acres in question are a part), these fifty-five acres were in the possession of one Inman, who held them under a contract of sale made by Nicholas Elmendorf, through whom the plaintiff derived his title. Inman had made improvements on the land, and after the plaintiff had purchased it he made a new contract with Inman for the same fifty-five acres. Inman surrendering his old contract. Inman remained in possession after this until, by a written executory contract, he sold the same land to Samuel Jones, who entered into possession and made further improvements and remained in possession till October, 1870. On the 13th June, 1868, the plaintiff by a quit-claim deed conveyed the 275 acres to McKoon, and on the same day Morris Schoonmaker executed a deed of the same premises to McKoon, who at the same time gave to Schoonmaker a purchase-money mortgage covering the whole 275 acres, which mortgage was afterwards assigned to the plaintiff and is the mortgage now in suit.

After this conveyance to McKoon, but before the mortgage given by him had been put on record, viz.: on the 1st of October, 1868, McKoon conveyed to Jones the fifty-five acres which he held under his contract with the plaintiff, and Jones gave back to McKoon his bond secured by a mortgage on the same premises for \$700, which is the mortgage under which the defendant Gleason claims. Jones' deed and mortgage were recorded on the 1st of December, 1868. Jones had no notice of the mortgage which had been given by McKoon and that mortgage was not recorded until January 8, 1869.

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The trial judge finds that Jones took his deed and gave the bond and mortgage in good faith, believing that he was acquiring an unincumbered title to his fifty-five acres, and that the whole purchase price of the land was secured by the bond and mortgage

Afterwards on the 2nd December, 1868, and before plaintiff's mortgage had been recorded, McKoon sold and assigned this bond and mortgage to the defendant Gleason for value. Gleason purchased them in good faith, believing the mortgage to be a first lien, after having searched the records and found no incumbrances on the property. He omitted however to record his assignment until March, 1870, and in the meantime, January, 1869, the plaintiff put his mortgage on record.

In 1870 Gleason foreclosed his mortgage and purchased at the foreclosure sale and received the sheriff's deed. The plaintiff was not a party to the foreclosure suit.

From the facts found it appears that when McKoon purchased the 275 acres, Jones was a vendee in possession of the fifty-five acres in question, under a contract which had precedence in point of time over the title of McKoon, and consequently over the mortgage given by McKoon to the plaintiff. That Jones as well as his predecessor had made improvements upon the land. The case does not show that this contract had been in any manner abrogated. Assuming it to have been in force at the time of the conveyance by McKoon to Jones, Jones at that time held the equitable title to the land, subject only to the payment of the amount due on his contract, and was entitled, on paying or securing that amount, to a conveyance free from any lien created either by the plaintiff or McKoon. Such a conveyance could have been compelled by him, by resort to a court of equity. The plaintiff and McKoon had full notice of the rights of Jones, and when the plaintiff conveyed to McKoon, the title of McKoon was subject to Jones' contract. So also was the mortgage given back by McKoon to the plaintiff, which is the mortgage in question. That mortgage consequently was

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not enforceable against Jones' equitable title. As between McKoon and the plaintiff, the latter was entitled, if necessary to his security, to pursue the purchase money received by McKoon, or the mortgage given therefor, but he had no lien upon the land superior to the title of Jones.

When Jones received his deed from McKoon, and when he placed that deed on record, the plaintiff's mortgage had not been recorded and Jones had no notice of it. If the conveyance was made by McKoon in fulfillment of the contract, I can see no reason why the legal title of Jones should not, for the purpose of determining the question of the lien of the plaintiff's mortgage, relate back to the equitable title of Jones, and be thus freed from the lien. A court of equity would doubtless have so decreed had Jones been put to his action for specific performance. But the General Term held that Jones, by accepting the deed from McKoon, lost all his equitable rights under his contract as vendee in possession; that they became merged in the legal title, and he could claim nothing except what he derived from that deed. Assuming this position to be sound, then clearly Jones was protected by the recording act, against the plaintiff's mortgage. He was a purchaser in good faith without notice of the mortgage, and his deed was first recorded. The only ground upon which it was held below that he was not protected by the recording act, was that he paid the whole of the purchase price by his bond and mortgage, and did not part with anything of value, and therefore he did not come within the statutory requirement of a purchaser for a valuable consideration. But if by accepting the deed he parted with his equitable title to the land, which had precedence of the plaintiff's mortgage, and with his right to his improvements, etc., then he was, within all the cases, a purchaser for value, and entitled on that ground to priority.

If the court had found in favor of the defendant Gleason on these grounds we should deem the facts found sufficient to sustain the conclusion, for we should, in accordance with settled rules, make all intendments necessary to sustain the

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finding. For instance, as nothing to the contrary appears, we should assume that the contract under which Jones held was still in force, or that Jones had equitable rights thereunder when McKoon conveyed to him, and that the conveyance was made in performance of that contract. But the court found against Gleason on the question of Jones' title, and based the judgment wholly on the rights of Gleason under his assignment of the Jones mortgage, and the recording act. We can therefore make no intendments in support of the equitable title of Jones or his position as a *bona fide* purchaser for value, but on the contrary the intendments must be the other way, and such as tend to support the conclusions of the referee. The consequence is that as the judgment cannot be sustained on the ground upon which it was placed in the court below, it must be reversed, and a new trial ordered, and on such new trial the rights of Jones to priority under his contract, or as a purchaser for value, may be more fully considered and determined.

Judgments of General and Special Terms should be reversed and new trial ordered, costs to abide the event.

DANFORTH, J. (dissenting.) On this appeal no questions are material except such as arise between the plaintiff and the defendant Gleason upon the following facts :

On the 1st day of December, 1868, one Dennis McKoon had a clear title of record to 275 acres of land situated in Delaware county. There was however outstanding his bond for \$1,500 secured by a mortgage upon these premises, not of record, given by him to one Schoonmaker. McKoon by deed recorded December 1, 1868 conveyed fifty-five acres part of the 275 to one Samuel Jones who took the deed in good faith, without notice of the mortgage above referred to, and under the belief that he was acquiring an unincumbered title to the land. At the same time he gave McKoon a mortgage for \$700, of which \$500 were for the purchase money of the fifty-five acres, and \$200 for a pair of oxen. It was recorded on the 1st of December, 1868. On the 2d

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of December, 1868, Gleason having first searched the records purchased of McKoon this mortgage for a valuable consideration, in good faith and without notice of the mortgage given by McKoon and believing the Jones mortgage to be a first lien upon the premises embraced in it. On the 27th of October, 1868, the McKoon mortgage was assigned to Westbrook; the mortgage was not recorded until the 8th of January, 1879. On the 29th of July, 1870, Gleason foreclosed the Jones mortgage—the assignment of the McKoon mortgage had not been recorded—Westbrook was not made a party; whether Schoonmaker was or not does not appear. Upon the sale under his foreclosure Gleason became the purchaser of the premises and received a deed therefor October 10, 1870, under which he and his grantees have since occupied the premises.

This action is brought for the foreclosure of the McKoon mortgage. Upon the trial the court found the facts above stated and held that the rights of Gleason acquired under the Jones mortgage were entitled to priority over those of the plaintiff under the McKoon mortgage, and the correctness of that decision is the question before us. The appellant's counsel contends that it is not, and his argument would be of great weight as to one branch of this case if there was either any defect or legal taint in the Jones mortgage, or any equity outside of the limit of the recording act, in favor of the McKoon mortgage as against the other. The authorities cited by him apply to cases within one or the other of these classes. They are as follows *Schafer v. Reilly* (50 N. Y., 61) was a controversy between a mechanic's lienor and a mortgagee. The mortgage was given without consideration, to be sold by the mortgagee for the benefit of the mortgagor—and was recorded—after the record the mechanic's lien attached—and after that the mortgage was sold—the mechanic's lien was given the preference, ALLEN, J., saying, "there is no question here under the recording act"—and adds, * * * "doubtless a *bona fide* grantee without notice of a prior unregistered deed may hold although

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his grantor may have taken title with full knowledge of such deed," and that this remark applies to mortgagees and assignees of mortgages is apparent not only from the context, but the cases cited by the learned judge, among others *Jackson v. Van Valkenburgh* hereafter referred to.

In *Greene v. Warnick* (64 N. Y., 220), the question was as to the priority between two mortgages. Each had been executed to secure portions of purchase-money to be paid for the premises described in them—"upon an agreement between the mortgagees that the mortgages should be equal liens, that neither was to have priority over the other and that both were to be recorded at the same time,"—one was recorded first—but the court said "although first recorded it was not a subsequent conveyance and therefore these two mortgages executed at the same time are not within the statute," and they "must share equally in the surplus money" which was in dispute. The equity which prevailed was the result of an agreement between the mortgagees, and the court held that the assignees were bound by the agreement. The equity did not rest upon the simple fact of notice. *De Lancey v. Stearns* (66 N. Y., 157), is to the effect that where a mortgage is taken without value paid, the taker is not a *bona fide* purchaser within the meaning of the recording act and that an assignee of such a mortgage stands in no better position than the mortgagee his assignor, as regards a prior unrecorded mortgage,—but that case recognizes the distinction on which the respondent here prevailed, the court saying "although on the question of notice the *bona fide* assignee of the mortgage for value may stand in a better position than the mortgagee, she cannot on the question of the consideration of the mortgage either as between herself and the mortgagor, or third parties," citing in support of the first part of the proposition, *Jackson v. Van Valkenburgh* (8 Cowen, 260), and *Fort v. Burch* (5 Denio, 187), and as to the last part, the case of *Schafer v. Reilly* (*supra*); and so far as it goes supports the respondent here—because in the case before us the question relates only to the effect of

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notice. *Trustees of Union College v. Wheeler* (61 N. Y., 88), presented no question under the recording act, nor did it turn upon the question of priority between successive mortgages on the same real estate. It related to equities between the mortgagee and certain purchasers by contract of portions of the mortgaged premises, and the question was whether as to them the assignee of the mortgage stood in any better position than his assignor, the mortgagor. *Crane v. Turner* (67 N. Y., 437), affirming S. C. (7 Hun, 357), where the facts are somewhat more fully reported, and in both courts the decision is put upon the priority given to the plaintiff's mortgage by the recording act. The Supreme Court say "the plaintiff's mortgage was duly recorded as against the defendant Turner claiming under the same title" and upon appeal this court said, "nor is there any ground for the position of the defendant's counsel, that under the recording act the plaintiff's mortgage was not notice to the defendant although recorded, because the record shows a perfect claim of title sustaining the plaintiff's mortgage," and the opinion closes with these words, "as the recording act does not aid the defendant and no ground is shown upon which he is entitled to priority it necessarily follows that there was no error." The remaining case cited by the appellant, *Davis v. Bechstein* (69 N. Y., 440), is foreign to any question before us. It involved no claim of priority between successive mortgages, but determined that a bond and mortgage executed without consideration and invalid between the parties, could not by the unauthorized act of the mortgagee be rendered valid in the hands of his assignee against the mortgagor. There is no doubt that the purchaser of a chose in action must abide the case of the person from whom he buys. And it is upon that rule that the cases relied upon by the appellant and above referred to stand. The respondent's case does not infringe it, nor interfere with *Bush v. Lathrop* (22 N. Y., 535), which stands upon the same doctrine and was also referred to in several of the above cases. It applies to cases where there is some inho-

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rent weakness in the security, as want of consideration, or usury, or where there is an agreement outside the mortgage affecting its priority or some other circumstance from which an equity arises against the enforcement of the whole or some part of the security, or where an assignment is in terms absolute but was in fact conditional, or for the whole amount appearing due when in fact it was for less. This distinction is insisted upon by Judge DENIO in *Bush v. Lathrop*. The thing in controversy in that case was a bond and mortgage, claimed by the defendant by assignment through Noble's assignee; Bush was Noble's administrator, and after stating the general doctrine which upholds the equities of third persons as well as those of parties to the instrument, the learned judge says: "It is necessary to add that I do not consider that the assignee stands in place of the assignor in every respect in all cases. The suggestion made in the earliest of the cases in this State, that the assignee if a *bona fide* purchaser without notice was not prejudiced by the notice of his assignor was well founded and has since been repeatedly recognized." (Citing among others *Jackson v. Van Valkenburg*—and adding): "*It was not notice* which prejudiced the title of the parties under whom the defendant claimed, but the fact that Noble, the last absolute owner of the bond and mortgage never parted with his title, except on condition that it should be returned to him on payment of a comparatively small sum of money. The defendant claimed under that conditional assignment, and though he may not have been aware of the condition he is nevertheless bound by it." So in *Greene v. Warnick* (*supra*), there was an agreement at the time of the execution and delivery of the two mortgages that neither should have priority over the other; and the assignee was held subject to that agreement and bound by it. So if the agreement had been that one of the two mortgages should have priority over the other, no doubt the assignee would have been bound by it, for such an agreement is valid and would be enforced notwithstanding the

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other was first recorded. (*Jones v. Phelps*, 2 Barb. Ch., 440; *Freeman v. Schroeder*, 43 Barb., 618.) For the reason stated in *Bush v. Lathrop*, and before referred to, the appellant's case does not permit the application of the principle upon which these cases stand. The Jones mortgage was free from defect, it was founded upon a good and valuable consideration as between the parties; valid in the hands of the mortgagee but not enforceable by him to the prejudice of rights acquired through the earlier mortgage executed by him upon the same premises. This disability, however, was personal to himself. He was precluded from asserting any right which would impair the undertaking he had given, or the value of the mortgage he had executed as security for its performance. It is as if a third party had notice of the earlier mortgage and the consequence is the same and not greater. He was under no obligation not to put his mortgage on record, and having done so, the statute which permitted it, and the assignment of the mortgage are both to be considered in determining the defendant's rights. The plaintiff relies upon notice of his mortgage only. But as to this the defendant stands upon the statute; and thus his position is different from that of the assignor, to the latter the statute has no application—for he had actual notice—the assignee had not. He ascertained that the Jones mortgage was recorded, and the omission of the plaintiff to record his mortgage created an assurance as if by statute that it did not exist. The defendant had not constructive notice, and the priority to which the plaintiff's mortgage would have been otherwise entitled is lost. (*Peabody v. Roberts*, 47 Barb., 94; *Tuttle v. Jackson*, 6 Wend., 213.) Such is the plain import of the statute (R. S., vol. 1, chap. 111, pt. II, p. 756), which declares that every unrecorded "conveyance shall be void as against any subsequent purchaser in good faith for a valuable consideration of the same real estate or any portion thereof whose conveyance shall be first duly recorded." (§ 1.) A "conveyance" includes a "mortgage." (§ 38, p. 762.) An "assignee

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of a mortgage" is a "purchaser." (§ 37, p. 762.) Both the plaintiff and the defendant are within this statute "purchasers." They hold by "conveyances." The defendant's mortgage was first recorded — his payment of consideration, good faith and want of notice are established. He is directly within the protection of the statute. Upon authority the conclusion is the same. In *Jackson v. Van Valkenburgh* (8 Cow., 260), above referred to, decided in 1828, it appeared that McKoon was the owner of certain premises and gave a mortgage thereon to the defendant in 1821. It was not recorded until October 29, 1825. In 1823 McKoon gave a mortgage to Fuller & Pettree; they were expressly informed of the preceding mortgage. Their mortgage was recorded January 28, 1823. On the 23d of July, 1825, it was assigned for value to the plaintiffs who had no notice of the first mortgage. In an action of ejectment against the first mortgagee, the assignees recovered, the court holding that they were not affected by notice to their assignors. I am not aware that this case has been questioned; it has on the other hand been frequently recognized and followed: (*Fort v. Burch*, 5 Denio, 187; *Corning v. Murray*, 3 Barb., 652; *Webster v. Van Steenbergh*, 46 id., 215; *Bush v. Lathrop*, 22 N. Y., 549.) *Williamson v. Brown* (15 id., 365) is cited in *De Lancey v. Stearns* (66 id., 161), but shown to be inapplicable to the facts then before the court because the mortgage under which the claim was made, was not given for value nor the party claiming under it a *bona fide* holder within the statute. The respondent is, however, not only the assignee of the mortgage, but a purchaser of the mortgaged premises. As such his rights are the same as if he had not been the owner of the mortgage or a party to its foreclosure. (*Wood v. Chapin*, 13 N. Y., 519.) He bought on the foreclosure of the Jones mortgage. His title is founded upon it (*People v. Beebe*, 1 Barb., 388; *Butler v. Viele*, 44 id., 166; *Packer v. R. and S. R. R. Co.*, 17 N. Y., 292; *White v. Evans*, 47 Barb., 185), and by relation may be deemed to have been acquired at the time of the

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delivery of the mortgage by Jones, which must have been as early as the date of record, December 1, 1868, and his rights are to be determined by the records in the clerk's office, as they existed on the 2d of December, 1868.

With knowledge of what facts, affecting Jones' title and the mortgage, is he chargeable? Jones was in possession of the premises under a deed from McKoon who, as then appeared from the records, had a clear and unincumbered title—no mortgage against the property, except the one executed by Jones. By the sale on the foreclosure the mortgage lien has become a title. There is no principle of law or equity which subjects it to the plaintiff's mortgage. It is in accordance with equity that as between himself and the defendant the plaintiff should suffer the consequences of his own negligence in omitting to record his mortgage, and that he should not now be permitted to the defendant's prejudice to assert a priority for his mortgage which, by the express provision of law, is, because unrecorded, void as against one standing in the position of the defendant. (1 R. S., chap. 111, tit. 5, pt. 2, § 1, p. 756.) It is true that the assignment to the defendant was not recorded until after the plaintiff had placed his mortgage on record, but that is immaterial. The registry of the Jones mortgage serves the defendant. This was the doctrine in *Hooker v. Pierce* (2 Hill, 650) where speaking of certain conflicting claims to land arising on different conveyances the court say, "the registry of the grantor's deed enures in the nature of things to the benefit of all those who claim under him. They become entitled to use all his habiliments of title as their own. They might acquire a better title than he but cannot be considered as having taken less. He being without constructive notice, they are not affected. It is enough that they personally act in good faith as the jury found them to have done. This finding frees them from all imputation of notice." The rule and the reason of it apply here. Referring to the title acquired by the purchaser on foreclosure DENIO J., says, "where legal title is concerned a mortgage, which for many other purposes, is a *mero chose*

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in action is a conveyance of the land, the interest remaining in the mortgagor is an equity, the foreclosure cuts off and extinguishes that equity and leaves the title conveyed by the mortgage absolute. (*Packer v. R. and S. R. R. Co., supra*) and to the same effect is the statute relating to conveyances on foreclosure. (2 R. S., 192, § 158; p. 72, Pt. 111, chap. 2, art. 6.) Gleason by the assignment of the Jones mortgage became a purchaser *sub modo*, *Frisbee v. Thayer* (25 Wend., 399); *James v. Johnson* (6 John. Ch. 417). He acquired the interest in the real estate which the mortgagee took by the mortgage and he is to that extent a purchaser not only of the mortgage but of the interest which is conveyed by it (*Belden v. Meeker*, 2 Lans., 470), and as he became such in good faith and for a valuable consideration he takes his title under that mortgage unaffected by the mortgage, then unrecorded which the plaintiff now seeks to enforce. I am thus led to the conclusion that the defendant is protected by the recording act from the consequences of notice to the mortgagee and no other defect in his title is suggested.

CHURCH, Ch. J., MILLER and EARL JJ., concur with RAPALLO, J.; DANFORTH, J., concurs with RAPALLO, J., as to effect of Jones' deed, but dissents as to recording act.

Judgment reversed.

GEORGE W. JONES, Plaintiff in Error, v. THE PEOPLE OF
THE STATE OF NEW YORK, Defendant in Error.

The Supreme Court may, upon application of the prosecution, issue a writ of certiorari, to remove an indictment into that court from the Oyer and Terminer.

As to whether a certiorari may be brought for that purpose without the consent and in spite of the authority of the Supreme Court, *quære*.

It is not necessary to give notice of application for the writ.

It is discretionary with the Supreme Court after having obtained jurisdiction of the case either to quash the writ upon cause shown, to remand

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the case to the Oyer and Terminer, or to proceed to its disposition as in other cases pending before it.

Accordingly *held*, that an order of the Supreme Court refusing to quash such a writ was not reviewable here.

(Argued November 10, 1879 ; decided November 25, 1879.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, affirming an order of Special Term, denying a motion on the part of the plaintiff in error to quash a writ of certiorari.

The plaintiff in error was indicted for perjury. Upon application of the district attorney, made without notice, an order was granted at Special Term directing the issuing of a writ of certiorari removing the indictment from the Court of Oyer and Terminer, in and for the county of Saratoga, into the Supreme Court.

A motion was thereupon made at Special Term, on behalf of the prisoner, to set aside said order and to quash the writ issued under it, which motion was denied.

J. P. Butler, for plaintiff in error. The Supreme Court had no authority to issue a writ of certiorari to remove the indictment into that court from the Oyer and Terminer. (Code Civil Procedure, §§ 3, 4, 5, 217, 219, 235 ; *People v. Stone*, 5 Wend., 39, 40, 41 ; 2 R. S., 732 ; Laws of 1788, vol. 2, p. 249 ; Const., art. 6, §§ 6, 9 ; 3 R. S. [6th ed.], 279, § 24 ; 2 id. [4th ed.], 881, 916 ; Laws of 1847, chap. 280, § 22 ; 1 R. S. [4th ed.], 58 ; id. [6th ed.], 94, §§ 6, 7 ; Code, § 20 ; New Code, §§ 217, 235 ; Barb. Cr. Law, 295 ; Blk. Com., 270 ; Modern Pleader, 8, 9, 10 ; Crompton's Practice, 26 ; Fourth Institute. 162 ; Modern Pleader, 17 ; 1 Hill, 183.) The re-arrest of Jones was without a shadow of authority. (1 Bacon Abb., 350 ; *Certiorari*, title A ; 1 Chitty Crim. Law, 377 ; 5 D. & E., 626 ; 6 id., 191 ; 2 Strange, 900, 1209 ; Cowper, 18 ; Crompt's Prac., 26 ; Declaration of Rights, 1776 ; Webster's Dicty. ; 1 Bl. Com., 231 [old ed.] ; 4 id., 261, 320 ; 4 Hume's Hist. Eng., 346, 498, 499 ; 1 R. S. [6th ed.] 44, § 35 ; Reviser's Notes, 8

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R. S., 847; part 4, chap. 2, Reviser's Notes, 42; 2 R. S., 132, § 29; 1 R. L., 339, § 15; Laws of N. Y., 1788, vol. 2, p. 249; 4 Parker, 190; 5 Term Rep., 626; 1 Bacon's Ab., 350; *People v. O'Lany*, 4 Park., 190; *King v. Inhabs.*, etc., 6 Term R., 194; 3 Bos. & Puller, 354; New Code, § 4; 2 R. S., 132, § 29; id., 130, § 12; 48 Penn. R., 56.)

Nathaniel C. Moak, for defendant in error. The people have an absolute right to remove an indictment into the Supreme Court, independent of any statutory provision. (Const., art. 1, § 17; Code, § 217; *R. v. Eaton*, 2 Term R., 89; *R. v. Lewis*, 4 Burr., 2458; Arch. Cr. Pl. & Ev. [17th Eng. ed.], 95; *Com. v. Capp*, 48 Penn. St., 53, 56; Hawk, b. 2, chap. 27; § 27; 1 East, 203 3, note d.; Hand's Prac., 37; Dick. Sess., 382; *Rex v. Thomas*, Mich. Term, 1815; 2 Chitty's Rep., 136; 1 Chitty Cr. Law [5th Am. ed.], 378; *Anon. Cases*, Temp. Hardres [Lee's ed.], 165, and note; *Rex v. Stannard*, 4 Term, 161; *Lempriere's Case*, 1 Mod. Rep., 41; 2 Hawk. Pleas Crown [Curwood's ed.], 401, § 27; *R. v. Inhabs. of Clare*, 4 Burr., 2458; *R. v. Stannard*, 4 Term, 161; *R. v. Burgess*, 1 Kenyon, 135; 1 Burn's Justice, 618. 634 [30th ed.]; *R. v. Allen*, 15 East, 333, 342; *R. v. Anon.*, 2 Chitty, 136; *R. v. Hobe*, 5 T. R., 542; *R. v. Davies*, id., 626; *R. v. Cumberland*, 6 id., 194; *Queen v. Spencer*, 9 Ad. & Ell., 485; S. C., 36 Eng. C. L. R., 264; *King v. Boulbee*, 4 Ad. & Ell., 498; S. C., 31 Eng. C. L., 226.) The district attorney may remove a criminal cause to the Supreme Court by *certiorari* as a matter of course and of right. (*People v. Vermilyea*, 7 Cow., 109, 140, 141; *People v. Baker*, 3 Park., 187, 188, 191; 1 Chitty Cr. Law [5th Am. ed.], 378, note 1; *Baker v. Munro*, 6 Cow., 396.) The case is to be tried at the circuit like other issues pending in the Supreme Court. (*People v. Ruloff*, 3 Park., 401, 409; Code, §§ 2, 4, 217, 232, 976, 1056; 2 R. S., 409, §§ 1, 2; 2 Edm. St., 426.) The writ being a matter of absolute right in behalf of the

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people there is no such thing as the improvident granting of one in that behalf. (1 Chitty Cr. Law [5th Am. ed.], 379, 380.) The application for the writ is an *ex parte* proceeding; it is not necessary that the prosecutor should have notice of it. (Arch. Cr. Pl. & Pr. [17th Eng. ed.], 97; 1 Burn's Just. [30th Eng. ed.], 634; *Simons v. Dinsdale*, 2 Exch., 533; *Com. v. Capp*, 48 Penn. St., 53, 56; *People v. Vail*, 6 Abb. [N. C.], 206, 211.) If when the writ of *certiorari*, removing the case, was granted, Jones was out on bail, and no one had a right to arrest him, that is a question which does not affect the validity of the *certiorari* or restrict the legal effect thereof. (2 Hawk. Pl. Cr. [Curwood's ed.], 416, § 83; 3 R. S. [6th ed.], 1022, § 57.)

CHURCH, Ch. J. The question whether a *certiorari* may issue by the Supreme Court, at the instance of the prosecution to remove an indictment into that court from the Oyer and Terminer, is the only question involved upon this appeal. If this power exists, it is discretionary with that court after having obtained jurisdiction of the case to quash the writ upon cause shown, or remand the case to the Oyer and Terminer, or proceed to its disposition as in other cases pending before it. The constitution recognized the existing Supreme Court with general jurisdiction in law and equity, (art. 6, § 6), and the New Code declares that such jurisdiction "includes all the jurisdiction which was possessed and exercised by the Supreme Court of the colony of New York at any time, and by the Court of Chancery in England on the 4th day of July, 1776" (§ 217), with such exceptions and limitations as have been created and imposed by the constitution and laws of the State. The constitution also preserves all compatible parts of the common law in force April 19, 1775.

The Supreme Court of the colony of New York, was invested with the jurisdiction of the King's Bench, Common Pleas, and Exchequer in England "to all intents and purposes whatsoever." (Ordinance of 15th May, 1699.)

"The Court of King's Bench," Mr. Chitty says, "having a general superintendency over all courts of inferior jurisdiction, may award a certiorari to remove the proceedings from any of them, except some particular statute or charter invest them with absolute judicature" (1 Chitty Cr. Law, 374), and therefore certiorari would lie to justices of Oyer and Terminer and gaol delivery, and he cites several authorities. The same doctrine is laid down by Blackstone. He also says that "a certiorari may be granted at the instance of either the prosecutor or the defendant, the former as a matter of right, the latter as a matter of discretion." (4 Black. Com., 321.) The authorities are numerous that this power existed and was frequently exercised by the King's Bench in England, and that it was transmitted by the constitution of 1777, and subsequent constitutions to, and is now possessed by the Supreme Court of this State. I am not prepared however, nor is it needful to determine that a district attorney, or the attorney general may without the consent, and in spite of the authority of the court bring a certiorari removing a criminal cause from the Oyer and Terminer to the Supreme Court. It is unnecessary to determine that question, as this writ was granted by the court on application, and such I think is the better practice, but if issued as a writ of right the Supreme Court would clearly have power to remand the case or quash the writ in its discretion.

The contention of the learned counsel for the prisoner is that the courts of England exercised this power solely in obedience to the king's prerogative, and that it was not a part of the common law, and was abrogated by the constitution of 1777, which declares that "the supremacy, sovereignty, and prerogatives claimed and exercised by the king of Great Britain, and his predecessors over the colony of New York, and its inhabitants, or repugnant to this constitution be, and they are hereby abrogated and rejected."

Without undertaking to inquire into the particular powers or matters to which this provision applies, it seems quite clear that it does not apply to those judicial remedies, which

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had become incorporated into the jurisprudence of the mother country, or the powers ordinarily exercised by the courts, although they may have had their origin in the prerogatives of the crown, unless they are repugnant to our constitution or laws. The writ of mandamus is a prerogative writ, but it was exercised by the courts before the revolution, and was transmitted to us by virtue of the constitutional provisions referred to, and there are many others of the same character. I conclude therefore that this was one of the powers conferred by the constitution itself. The judiciary act of 1847 seems to recognize the power by providing that "writs of error, and *certiorari* may be brought to remove judgments, and suits, and proceedings from any court of Oyer and Terminer, and Court of Sessions in all cases where such writ may now be brought to remove judgments, and suits, and proceedings from the courts of Oyer and Terminer, and from the present courts of General Sessions of the peace." (Laws of 1847, p. 324, § 17.) That the power exists, has been the understanding of the bar, and the practice of the courts in this and other States, although there are but few reported cases. (*People v. Vermilyea*, 7 Cow., 118, 140; *People v. Baker*, 3 Park. Cr. R., 187; *Com'th v. Roby*, 12 Pick., 498; *Com'wth v. Capp*, 48 Penn. St., 56.) We should hesitate about abrogating this practice even if we entertained doubts of its correctness, after the uniform acquiescence in its existence for so long a period. The Legislature has full power over the subject, and perhaps it should be exercised as it has been, in respect to the writ, when applied for by a defendant. (2 R. S., 731.) In the *People v. Stone* (5 Wend., 40), it was decided that a court of Oyer and Terminer could grant a new trial, and in the opinion its jurisdiction is spoken of as *exclusive*, but in *People v. Judges of Dutchess Oyer and Terminer*, (2 Barb., 282), a contrary doctrine was held, and in an elaborate opinion by STRONG, J., the authority of the Supreme Court over the Oyer and Terminer, including the power of removing criminal cases is maintained and upheld. I am unable.

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to find either in the constitution or laws of the State, any warrant for holding that the Court of Oyer and Terminer is a court of general and exclusive jurisdiction, and I concur in the conclusion arrived at in the case last cited. I agree fully with the learned counsel for the prisoner that in general indictments should be tried in the criminal courts provided by law, and it is argued that it is incongruous to the system adopted for the trial of criminal cases, where a lay element is incorporated in the constitution of the court, to transfer such trials to the civil calendar when they are triable by a single judge, but I think the power exists, and the answer to suggestions against it is that either in the first instance on the application for the writ of certiorari, or upon a motion to quash or supersede the writ the court has full power to prevent any injustice, and after our long experience, I am not aware that abuses have been complained of. Being in the Supreme Court the Code provides that all issues of fact for trial by a jury in the Supreme Court shall be tried at the circuit. (§ 976.) There is no practice requiring notice of the application for the writ. The authorities are uniform against it. The validity of the order for the re-arrest of the prisoner is not involved in this appeal.

According to these views the quashing of the writ was discretionary with the court below, and hence the order was not appealable, and the appeal must be dismissed.

All concur.

Appeal dismissed.

Statement of case.

DAVID S. ADEE et al., Appellants, v. JACOB CAMPBELL et al., Administrators, etc., Respondents

M. died intestate, leaving no descendant, parent, brother, sister, descendant of any brother or sister, uncle, or aunt, but leaving first cousins, and the children of deceased first cousins. *Held*, that the first cousins were entitled to the personal estate, to the exclusion of said children. The statute of distributions (2 R. S., 96, § 75, subds. 5, 11), provides for no representation among collaterals, except in the case of children of brothers and sisters of the intestate; if there are none of these the nearest of kin, in equal degree, take the whole.

(Argued November 10, 1879; decided November 25, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a decree of the surrogate of the county of Westchester, upon the final accounting of defendants, as administrators of the estate of John A. Merritt, deceased. (Reported below, 14 Hun, 551.)

Said Merritt died, leaving no widow, child, father, mother, brother, sister, descendant of any brother or sister, uncle or aunt. He left a number of first cousins, and children of deceased first cousins. The surrogate adjudged that the only persons entitled to share in the distribution of the personal estate were the first cousins.

A. G. Vanderpoel, for appellants. Under subdivision 5 of section 75 of the statute of distributions, the appellants, children of deceased first cousins, were entitled to share in the estate. (1 Black. Com. [Sharswood's ed.], bk. 2, p. 216; *Embury v. Conner*, 3 N. Y., 517; *In re John and Cherry Sts.*, 19 Wend., 659; *Bloodgood v. M. and H. R. R. Co.*, 18 id., 59; *Taylor v. Porter*, 4 Hill; 2 Kent's Com. [5th ed.], 340, note c; *Wilkinson v. Leland*, 2 Peters, 657.)

Calvin Frost and *S. H. Thayer, Jr.*, for respondents. Under subdivisions 5 and 11 of section 75 of the statute of distributions,

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only the first cousins of the intestate were entitled to share in his estate. (2 R. S., 69, 70, § 75, subds. 5, 11; Eng. Stat., 22, 23, Charles II, chap. 10 [1671-1672]; 1 James II, chap. 17; *Carter v. Crawley*, Sir T. Raym. R., 496; *Caldicot v. Smith*, 2 Shaw, 286; *Maw v. Harding*, 2 Vernon, 233; *Pett v. Pett*, 1 P. Wms., 25; S. C., 1 Salk., 250, and Ld. Raym., 571; *Bowers v. Littlewood*, 1 P. Wms., 594; *Ross Trust*, L. R. [13 Eq.], 286; 2 Williams on Exrs., 1298; Toller, 383-384; 1 R. L., 1813, p. 313; 2 R. S., 96, 97; Reviser's Notes [3 R. S., 645]; *Hellet v. Hare*, 5 Paige, 315; *Doughty v. Stilwell*, 1 Brad., 300; *Matter of Suskley*, 11 Hun, 344; *Matter of Gooseberry*, 52 How. Pr., 310; 3 Redf. on Wills [2d ed.], chap. 18, § 50, p. 423; North Carolina Rev. Code, chap. 64, § 1; *Johnson v. Chesson*, 6 Jones Eq. [N. C.], R., 146; Maryland Code General Laws, art. 47, § 27; *McComes v. Amos*, 29 Md. [Ct. of App.], R., 132; *Porter v. Askew*, 11 Gill & J. [Md.] R., 346; *Ellicott v. Ellicott*, 2 Md. Chy. R., 468; *Parker v. Nims*, 2 N. H., 460; Purdon's Dig. [Penn.], 563; *Krout's Appeal*, 60 Penn., 380; R. S. New Jersey, p. 355; *Davis v. Vandever*, 23 N. J. [Eq.], 558; 2 R. S., 96; Williams on Exrs. [5th ed.] 1361; 1 Bradf., 300.)

RAPALLO, J. The intestate having left no widow or descendant, his personal estate was distributable among his collateral next of kin in equal degree and their legal representatives. (2 R. S., 96, § 75, subd., 5.) It is provided however by the same section (subd., 11) that no representation shall be admitted among collaterals, after brothers and sisters children. Our statute is in this respect the same as that of England, and it has long been settled that the brothers and sisters referred to, are those of the intestate. (*Carter v. Crawley*, T. Raymond, 496; *Doughty v. Stilwell*, 1 Bradf., 300.) In the present case, the intestate having left no descendant or parent, brother or sister, or descendant of any brother or sister, nor any uncle or aunt, his nearest of kin were his first cousins. The personal property was properly distributed among them.

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The appellants are children of some deceased first cousins of the intestate, and claim to be entitled to take as representatives of their parents, the shares to which such parents would have been entitled if living. This claim is excluded by the statute. The children of deceased cousins are much more remote in degree of kinship than those of deceased brothers and sisters of the intestate, and cannot, under the express provision of the statute cited, be admitted as representatives, when persons nearer of kin are living. The statute provides for no representation among collaterals except in the case of brothers and sisters children. If there are none of these, the nearest of kin in equal degree take the whole. (See *Hurtin v. Proal*, 3 Bradf., 414.) The appellant contends that the limit of representation applies only where there are brothers and sisters children, and that consequently where the intestate leaves none, the right of representation among more remote collaterals is unlimited. Such a construction would be in the highest degree unreasonable, and contrary to the plain intent of the statute.

The judgment should be affirmed.

All concur.

Judgment affirmed.

FRANCIS M. THOMPSON, Appellant, v. THE COMMISSIONERS
FOR LOANING CERTAIN MONEYS OF THE UNITED STATES
FOR THE COUNTY OF OTSEGO et al., Respondents.

A sale under a mortgage, given pursuant to the act, "authorizing a loan of certain moneys belonging to the United States" (chap. 150, Laws of 1837), being a statutory proceeding, a failure to comply with the provisions of the statute, renders the sale void.

The advertisement of sale must indicate who executed the mortgage, and to whom it was given.

Commissioners appointed under said act, in case of default in payment as specified therein, become seized as trustees only, subject to the possession and the right of the mortgagor to redeem, until a legal sale is made in conformity with the statute.

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Where a published notice of sale under such a mortgage omitted the name of one of the mortgagors, and stated that the mortgage was given to "the Commissioners of the United States Deposit Fund," instead of "the Commissioners for loaning certain moneys of the United States," as stated in the mortgage, and as designated by the statute. *Held*, that the notice was defective and the sale illegal; and that the mortgagors were thereafter entitled to redeem.

After such an illegal sale a mortgagor served upon the commissioners a notice in writing, offering to pay the amount of the mortgage, principal and interest, and to redeem the premises; also stating therein that she desired an accounting of the rents and profits, possession having been taken by the purchaser. The commissioners made no answer. In an action to redeem, *held*, that the omission to make tender was not fatal to the action, but that in any event it only affected the question of costs; that the plaintiff in such an action occupied the same position as any other mortgagor seeking to redeem; also, that plaintiff was entitled to an accounting from the purchaser and his successors in interest and possession for the rents and profits.

Also *held*, that such an action, with all the parties brought in, was the proper remedy in such case.

Plaintiff, at the time of the execution of the mortgage, was the owner in fee of one-third of the premises; she subsequently received a deed from her husband of the other two-thirds. *Held*, that defendants were not in a position to raise the question as to plaintiff's rights as grantee of her husband.

Thompson v. Commissioners (16 Hun, 86), reversed.

(Submitted November 10, 1879; decided November 25, 1879.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, reversing an interlocutory judgment in favor of plaintiff, entered upon a decision of the court, and granting a new trial. (Reported below, 16 Hun, 86.)

This action was brought to redeem certain premises described in the complaint from the lien of a mortgage, and for an accounting of the rents and profits.

The plaintiff and her husband, John Thompson, on the 9th day of November, 1872, executed and delivered to the defendants, "the Commissioners for loaning certain moneys of the United States, of the county of Otsego," a mortgage which conveyed to said defendants, the premises described in the complaint, to secure the payment of \$953 in four years from the date thereof, with interest thereon, to be paid

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annually. Plaintiff was then the owner in fee of one-third of the premises; her husband was the owner of the other two-thirds, which he subsequently conveyed to plaintiff. The mortgagors made default in the payment of the interest, which became due on the 9th day of November, 1873. The defendants, said commissioners, advertised the premises described in the complaint for sale at public auction to the highest bidder, on the 1st Tuesday of February, 1874, and sold, in pursuance of the advertisement, to defendant, Philip Darwin. In the notice of sale, the defendants, commissioners, describe themselves as "the Commissioners of the United States Deposit Fund, for the county of Otsego." The mortgage was described as executed by John Thompson alone. Said Philip Darwin took possession of the premises without the consent of plaintiff. He conveyed to defendant, Frederick Palmer, and Palmer sold a portion thereof to defendant Brownel. Said Palmer and Brownel were in possession when this action was commenced.

The court found that plaintiff offered said defendants, the commissioners, to pay the principal and interest of said mortgage, and to redeem the premises described therein, and in said complaint, from the lien thereof. which offer the commissioners refused to accept.

The offer was made by service of the following notice upon the commissioners :

"To David W. Thurber and Simeon R. Barnes, Commissioners for loaning certain moneys of the United States, of Otsego county :

"I hereby offer to pay the amount due, principal and interest, on the mortgage given by John Thompson and myself to "the Commissioners for loaning certain moneys of the United States, of the county of Otsego," on the 9th day of November, 1872, to secure the payment of \$953 and the interest thereon, and to redeem the premises in said mortgage described from the lien thereof, or that was created thereby; and I also desire an accounting for the rents and

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profits of said premises since you, or any person claiming under you, took possession thereof, and the amount, when ascertained, paid to me, or to apply on the amount due on said mortgage."

"Dated *November* 26, 1875.

"FRANCIS M. THOMPSON."

The court directed judgment adjudging said sale and the conveyances to the individual defendants void, and that plaintiff on paying the principal of the mortgage, and interest, was entitled to redeem, and to possession; and that thereupon the defendants in possession account for the rents and profits; also referring it to a referee to take and state the account. Judgment was entered accordingly.

H. Sturges, for appellant. Plaintiff's right to redeem remained in full force until the premises were disposed of at a legal public sale in conformity with the statute. (*Sherwood v. Reade*, 7 Hill, 431, 433, 438; *Pell v. Ulmar*, 18 N. Y., 139; *Olmstead v. Elder*, 5 id., 144; *White v. Lester*, 1 Keyes, 316; *Thomas on Mortg's*, p. 170, and cases cited; 3 J. R., 528.) Plaintiff's right to have an accounting for the rents and profits is incident to the right to redeem. (*Thomas on Mortg's*, p. 231, and cases cited.) There was no legal service of the notice of sale. (Laws of 1863, chap. 73, § 1, vol. 6, Stat. at Large, p. 59; *Schenck v. McKie*, 4 How., 246; *Peebles v. Rogers*, 5 id., 210.) A sale by the loan officers without the notice required by law is invalid and will be set aside. (*Rogers v. Murry*, 3 Paige, 390; *Cole v. Moffit*, 20 Barb., 18.) In foreclosing by advertisement mistake in mailing notice renders the foreclosure void. (*Robinson v. Ryan*, 25 N. Y., 320, and cases cited; *St. John v. Bumstead*, 17 Barb., 100.) The failure of the commissioners to make a legal sale of the premises has left the plaintiff the right to redeem. (*Pell v. Ulmar*, 18 N. Y., 139-147.) It is sufficient to maintain this action that the plaintiff offered to pay the amount to be paid, principal and

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interest, on the mortgage, without tendering money, the defendants refusing and resisting such redemption. (*Sillsbee v. Smith*, 60 Barb., 372; 2 Van Santvoord's Eq. Prac. [2d ed.], 113, 114; *Sherwood v. Read*, 7 Hill, 433.)

Samuel S. Edick, for respondents. Plaintiff could not recover as the grantee of her husband, John Thompson. (*White v. Wager*, 25 N. Y., 328; *Winans v. Peebles*, 32 id., 423; *Meeker v. Wright*, 11 Hun, 533; *Voorhees v. Pres. Church*, 17 Barb., 103; *Van Nostrand v. Wright*, Hill & Denio, 263.) No legal and proper tender has been made or offered to the commissioners, or either of the defendants, upon which plaintiff is entitled to redeem. (5 Wait's Practice, 287.) The mortgage given to the commissioners, and the rights of the parties under it, is governed exclusively by statute. (1 R. S., 744 [6th ed.], § 11.) By the default of John Thompson in the payment of the moneys due on this mortgage, his title and that of his heirs or assigns was *ipso facto* destroyed and foreclosed. His common law equity of redemption was entirely gone, and nothing was left but a special right of redemption to be enforced only by a strict compliance with the provisions of the statute. Such default was equivalent to a foreclosure pronounced by the decree of a competent court. (*White v. Lester*, 1 Keyes, 316; S. C., 34 How., 136; *Pell v. Ulmar*, 18 N. Y., 139.) To constitute a tender there must also be an actual offer or *manual* tender of the money. (*Bakeman v. Pooler*, 15 Wend., 637; 1 Wait's L. & P., 1046, and cases cited; *Champion v. Joslyn*, 44 N. Y., 653.) Plaintiff was not entitled to an accounting for the rents and profits. (2 Barb. Chy. Pr., 199.) The commissioners have no discretion to exercise, but are bound to accept the money when legally tendered. (*Ex parte Goodell*, 14 J. R., 325; *Hull v. Supervisors*, 19 id., 259.) The notice of sale was sufficient to satisfy the requirements of the statute. (*Jackson v. House*, 3 Cow., 241, *Dezell v. Odell*, 3 Hill, 215; *Finnegan v. Cowaher*, 47 N. Y., 500; *Town v. Needham*,

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3 Paige, 545; *Thompson v. Blanchard*, 4 N. Y., 303; *Demeyer v. Legg*, 18 Barb., 14; 9 Paige, 659; 57 N. Y., 322; *Johnson v. Supervisors*, 45 id., 196; *Wood v. Terry*, 4 Lans., 80.)

MILLER, J. The notice of the sale of the premises by the commissioners was defective in several particulars and was not made in conformity with the statute relating to the subject. By chapter 150, Laws of 1837, § 30, it is provided that: "If any borrower shall neglect to pay yearly and every year on the first Tuesday of October, or within twenty-three days thereafter, on one of the days on which the commissioners aforesaid are by this act directed to attend their respective offices, the yearly interest due on his mortgage, and also the principal moneys loaned to him then due, then and in either of these cases the commissioners of the county where the lands mortgaged by the borrower are situated, shall be seized of an absolute and indefeasible estate in fee in the said lands to them, their successors and assigns, to the uses in this act mentioned, and the mortgagor, his or her heirs or assigns, shall be utterly foreclosed and barred of all equity of redemption of the mortgaged premises, any law, usage, custom or practice in courts of equity to the contrary notwithstanding. But the mortgagor, his or her heirs or assigns, shall be entitled to retain possession of the mortgaged premises until the first Tuesday of February thereafter, and to redeem the same as hereinafter provided." It will be noticed that the commissioners become seized "to the uses" mentioned in the act, thus making them trustees for the purposes therein named, subject to the possession and the right of the mortgagor to redeem.

By section 31 the commissioners are directed to advertize and sell the mortgaged premises on the first Tuesday of February after default, and to convey the lands to the highest bidder. This advertisement of the sale must necessarily contain sufficient to indicate who executed the mortgage and to whom it was given. It appears from the notice in question

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that one of the mortgagors, the plaintiff, was not named therein, and that the mortgage was given to the "Commissioners of the United States Deposit Fund." No such mortgage had been executed as the one described, but a mortgage to the "Commissioners for loaning certain moneys of the United States." This was the designation of the mortgagees by statute, and a different one was not in accordance with its requirement. The foreclosure being a statutory proceeding, the statute must be followed; and a failure to comply with its provisions renders the sale nugatory and of no avail. (*Sherwood v. Reade*, 7 Hill, 434.)

Another defect is alleged to be fatal to the validity of the proceedings, but as those already named rendered the sale irregular and of no effect in law, it is not necessary to consider it. As it was not in accordance with the statute, no title passed from the mortgagees to the purchasers, and the commissioners merely held the mortgaged property as trustees under section thirty already cited. They had neither disposed of, nor had they any title to the premises which deprived the mortgagor of the right to redeem. They had no title whatever, except under the statute; and as they had failed to pursue this in selling the property, the mortgagor had the right to redeem.

Section thirty-three of the act in question provides for another sale by advertisement, in case no person shall bid, or the person bidding shall not pay at the first sale, on the third Tuesday of September then next, and allows the commissioners to bid in behalf of the State at an appraised valuation, in case such bidding shall be necessary to prevent the sale for a less sum. It then provides for a redemption if the mortgagor "shall at or before the sale pay to the said commissioners all sums of money as shall be due and payable on such mortgage on the first Tuesday of October then next, for principal and interest, and costs and charges of foreclosure as prescribed by the act, together with the costs of advertising the same, and that then the title in fee to the mortgaged premises shall revert to and reinvest in the mort-

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gagor, his heirs or assigns," etc., until another default is made. The concluding portion of this section declares that "all purchases made contrary to the provisions of this section shall be void."

The section last cited relates only to a second advertisement or sale after the first attempt to sell has failed. In principle no reason exists why a redemption should not be made, where there is a void sale, at any time. No title is conferred by such a sale, and no authority is given to the commissioners to hold the land. The purchasers acquired no title, and the commissioners can give none except by pursuing the statute. Taking the provisions of the various sections cited together, it is quite obvious that it was not intended that the provision in the thirtieth section, which declares that the commissioners shall be seized and the mortgagor shall be foreclosed and barred of all equity of redemption, should be enforced where there was no valid sale of the premises, but only in cases where the statute had been followed. It was not the intention of the law that title should be conferred in any such irregular manner, and a mortgagor be deprived of his right to redeem when the proceedings are thus illegal and unauthorized. The provision in the mortgage in reference to the failure to make payments and the forfeiture arising therefrom — which merely follows the statute — is not to be regarded as of any more force than the statute itself. The right to redeem is fully recognized, where the sale is void, in the reported cases. In *Sherwood v. Reade* (7 Hill, 431), it was said by BEARDSLEY, J.: "This right to redeem exists in full force until the premises are disposed of at a legal public sale in conformity with the statute." It is true that in the case cited the action was brought to restrain the commissioners from giving a conveyance because the sale was illegal; but the assertion of the principle stated was appropriate to the case considered. In *Pell v. Ulmar* (18 N. Y., 139), which was an action of ejectment to recover possession of the premises which the commissioners had taken under a void sale, DENIO, J., laid

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down the rule that "the failure of the commissioners to make a legal sale of the premises has left to the plaintiff the right to redeem, but not to have the premises without redemption." Some remarks are made in the opinion which are relied upon to show that the statute foreclosed the right to redeem after a failure to pay as required; but they are not inconsistent with the assertion of the right to redeem upon a failure to make a legal sale, which is expressly decided. The same may be observed as to the remarks in the opinion in *White v. Lester* (1 Keyes, 316), which are also relied upon. The omission to pay the principal and interest alone, as the statute requires, cannot prevent a redemption where there has been no sale, or what is equivalent to it, there is a void sale.

In the absence of any valid sale or lawful proceedings under the act, the right to redeem is perfect and complete; and the question arises whether it was properly exercised. The plaintiff, by the writing introduced in evidence bearing date November 26, 1875, which was served upon the commissioners, offered to pay the amount of principal and interest on the mortgage in question, and to redeem the premises, and also stated therein that she desired an accounting of the rents and profits, etc. The commissioners made no answer to this request. They did not refuse on the ground that the plaintiff did not tender the money, or that she demanded an accounting of the rents and profits; and the court found that the plaintiff offered to pay and the commissioners refused to accept.

It is claimed that there should have been a legal tender of the money, and this alone can satisfy the statute, and that such tender should have been made good by paying the money into court. If the commissioners prevented the tender, perhaps they are not in a position to avail themselves of the non-performance, they have occasioned. (*Fleming v. Gilbert*, 3 J. R., 528.) But even if a tender was required, there is no reason why the plaintiff does not occupy the same position as any other mortgagor who seeks to

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redeem ; and the want of a tender can only affect the question of costs. There is no such distinction between that case and the one at bar as calls for the application of a different rule here than the one usually invoked. The failure to make a strict legal tender at most involves the right to costs, and this question was properly reserved by the judge until the coming in of the report of the referee.

As to the claim of the plaintiff for an accounting for the rents and profits, no good reason is shown why the defendants, who were in possession, should not account for the same. These defendants have no right to the possession whatever, as they took and held it under a void sale. The plaintiff cannot bring ejectment, as held in *Pell v. Ulmar* (*supra*), and has no way of obtaining her rights except by an equitable action, where all the parties can be brought in. An effectual remedy would not be obtained by an action or by a mandamus against the commissioners alone, as other parties are in possession and should be brought in.

It is insisted by the defendants' counsel that the plaintiff cannot recover as the grantee of her husband. The plaintiff, it is conceded, was the owner in fee of one-third of the premises, and assuming that the remaining two-thirds was conveyed to her by her husband, we think that the defendants are not in a position to raise that question in this action. In the cases cited by the counsel for the defendants the question was directly in issue, while here it is collateral to the main question. The plaintiff has a *prima facie* right, and an equitable title. The husband would be estopped from claiming title as against her, and under recent legislation he has a right to convey to his wife. (S. L. of 1862, chap. 172; *Meeker v. Wright*, 76 N. Y., 262.)

There was no error in any of the rulings of the judge upon the trial as to the evidence ; the order of the General Term must be reversed and the judgment of the Special Term affirmed.

All concur ; EARL J. concurs in result.

Judgment affirmed.

79	64
119	879
79	64
156	578

IN THE MATTER OF PROCEEDINGS BY THE BOSTON, HOOSAC TUNNEL AND WESTERN RAILWAY COMPANY TO ACQUIRE THE RIGHT TO CROSS THE RAILROAD OF THE TROY AND BOSTON RAILROAD COMPANY.

In proceedings under the provision of the railroad act (subd. 6, § 28, chap. 140, Laws of 1850) by one railroad company to acquire the right to cross the railroad of another company, the petition was verified by one styling himself the consulting engineer of the petitioning company; it did not appear that he was an officer of said company; the other company answered the petition on the merits and went to a hearing on the petition and answer; it did not appear that any objection was made as to the verification. *Held*, that it was too late to raise the objection on appeal to this court; that by omitting to raise it below, it was waived. (DANFORTH, J., dissenting.)

A defect in the verification of the petition is not a jurisdictional defect. (DANFORTH, J., dissenting.)

The petition alleged the inability of the two companies to agree upon the points and manner of crossing, and the compensation to be made therefor; this was not denied in the answer, and there was no offer to disprove it. *Held*, that proof thereof was not required to be given by the petitioner.

In such proceedings proof is not required on the part of the petitioner as to allegations of the petition not put in issue.

Said act authorizes more than one crossing by a railroad company of the track of another road.

The fact that the road of the petitioning company, at some points, is parallel with the road sought to be crossed, does not exclude said company from the provisions of the act.

The points of crossing are not necessarily fixed by the notice of the location of the new road, and the failure of the company, whose road is sought to be crossed, to object within fifteen days. The general provisions of the statute in regard to such location, and the right of property owners to object, are not applicable.

Objections to the proposed points of crossing, on the ground that they interfere with lands of the old company, already appropriated for stations, etc., are not proper to be raised on application for the appointment of commissioners; they are matters to be considered by the commissioners.

It seems, that said act does not authorize the invasion of lands or buildings already appropriated to railroad uses which, in their nature, require an exclusive occupation, or which would be materially impaired by subjecting the land to the new use.

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It seems, also, that if the commissioners, in locating the crossings, violate the legal rights of the old company, in the respect last mentioned, their action is reviewable.

So, also, it *seems* that the right to object to disturbance in the enjoyment of premises, devoted to public uses which require the enjoyment to be exclusive, is not waived or forfeited by an omission to apply within the statutory time for a change of location.

(Argued November 11, 1879; decided November 25, 1879.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, affirming an order of Special Term, appointing commissioners to fix the points, and manner, in which the Hoosac Tunnel and Western Railway Company should cross the road of the Troy and Boston Railroad Company, and the compensation therefor.

The petition alleged the filing of the proper maps showing the proposed crossings, and the service of notice of location of the proposed road on the Troy and Boston Company, and the lapse of fifteen days before the filing of the petition. The proposed route of the new road, for about twenty-three miles, is nearly parallel with the old road, crossing it twice in a distance of about four miles. The petition alleged an attempt and failure to agree with the Troy and Boston Company, as to the points and manner of crossing, and the compensation to be paid. This was not denied in the answer. The petition was verified by T. Haskins DePuy, who states in his affidavit of verification that he is "the consulting engineer in charge of the engineering, and construction of the railway described in the foregoing petition."

The answer alleged, in substance, among other things, that the petitioner's road could be constructed without unusual expense, with but one crossing; that the proposed road is so located that it will take lands from the Troy and Boston Company, necessary to it for turn-outs, sidings, double tracks and tank-houses. The Special Term on presentation of the petition and answer refused to take proof, and ordered the appointment of commissioners.

Further facts appear in the opinion.

Opinion of the Court, per RAPALLO, J.

Esek Cowen and *Samuel Hand*, for appellant. The order is void, for the reason that the petition does not state facts sufficient to give the court jurisdiction, and is not properly verified. (*Hill v. Bond*, 22 How., 272; *Brewer v. Tucker*, 13 Abb., 76; *In re Haynes*, 18 Wend., 611; *Yates v. North*, 44 N. Y., 271.) The petitioner could not take land already dedicated to a similar public use, and held by the Troy and Boston Company for necessary railroad purposes. (*Matter of B. and A. R. R.*, 53 N. Y., 574; *Matter of City of Buffalo*, 64 id., 547; id., 68 id., 171.)

E. W. Paige, for respondent. The court correctly ruled all the answers, after the first, to be immaterial. (*Matter of Buff. and L. R. R.*, 77 N. Y., 557; 15 Hun, 365.)

RAPALLO, J. This appeal is taken from an order of the General Term, affirming an order of the Special Term, appointing commissioners to determine the points and manner of crossing the appellant's railroad, by the petitioner. The appellant objects that the petition is not properly verified, and that there is no proof of the inability of the two companies to agree upon the points and manner of crossing, and the compensation to be made therefor. The verification is made by T. Haskins DePuy, who states that he is consulting engineer of the petitioning company. It does not appear whether or not he is an officer of the company. It does not appear that any objection on this ground was made in the court below. On the contrary the appellant answered the petition on the merits, and went to a hearing on the petition and answer. It seems to us that it is too late to raise this objection here. If made when the petition was presented, the verification could have been supplied, or proof that Mr. DePuy was an officer might have been furnished. By answering, and going to a hearing without objection, the imperfection was, we think, waived.

The want of proof of inability to agree does not, we think, invalidate the proceeding. That fact was alleged in the

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petition, and not denied in the answer, and there was no offer to disprove it. I do not understand that any proof on the part of the petitioner is required in these proceedings as to allegations which are not put in issue.

A defect in the verification of the petition is not in our judgment a jurisdictional defect. The statute leaves the matter of verification to be regulated by the practice of the court, and prescribes no precise formalities.

The next point urged is that the statute does not authorize more than one crossing by a railroad company of the track of another. We do not think this point tenable. The statute authorizes the crossing and intersection of a railroad at any point on its route, and speaks of such intersections and connections and crossings in the plural number. It provides that if the two corporations cannot agree upon the points and manner of such crossings and intersections, etc., commissioners may be appointed. The very purpose of providing for the appointment of these commissioners is to determine, in case of dispute, at what points the crossings shall be made, and in what manner, and it is the obvious duty of these commissioners to see that the crossings are not made in such a manner, or at such points, as to unnecessarily interfere with the operation of the road to be crossed.

We find nothing in the statute which would authorize us to exclude from its provisions roads which at some points run parallel with the road to be crossed. The points of crossing are not necessarily fixed by the notice of the location of the new road, and the failure of the company owning the previously constructed road to object to such location within fifteen days. The subject of crossing existing railroad tracks being specially provided for, and the proceedings by which the points of crossing are to be determined being pointed out by the statute, the general provisions in regard to the location of the road and the right of property owners to object to such location, are not applicable to the matter of crossing, and cannot deprive existing roads of any of the protection which the provisions in respect to crossings afford them.

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The objections raised to the proposed points of crossing, on the ground that the crossings at those points will interfere with lands of the appellant already appropriated for stations and other uses connected with the operation of its railroad, are premature at this stage of the proceeding. They are matters to be considered by the commissioners, and the objections now urged may be obviated by their determination. Furthermore, the order appealed from expressly reserves all these questions by providing that it is without prejudice to the right of the appellant, on the coming in of the report of the commissioners, to raise any objection to the right to cross, which could have been raised preliminary to the granting of the order. The statute, it is true, provides that the crossings and intersections may be upon the grounds of the constructed railroad. This must necessarily be, as the crossing of the track must be upon the roadway of the company whose track is crossed, but we apprehend that it was not intended by this general language to authorize the invasion of lands or buildings already appropriated to railroad uses, which in their nature require an exclusive occupation, or which would be materially impaired by subjecting the land to the new use. Such lands could not according to the principles of our previous decisions be condemned for a new and inconsistent public use, at least without express legislative authority for thus changing the use. (*Matter of B. and A. R. R.*, 53 N. Y., 574; *Matter of City of Buffalo*, 64 id., 547; *Same Matter*, 68 id., 171.)

It cannot be presumed that commissioners would locate a crossing on any such lands, or at any point where, to render the crossing available, it would be necessary to invade any such lands or constructions thereon. If they should, their action would be reviewable, and the crossing would be unavailable if so located that the company crossing could not obtain a right of way beyond the point of crossing. All these matters are necessarily to be considered in determining the points and manner of crossing. This duty does not devolve upon the court in the first instance, but upon the

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commissioners whom it is authorized to appoint for the purpose. If they violate any legal right of the appellants their action can be reviewed. The right to object to disturbance in the enjoyment of premises devoted to public uses which require that the enjoyment should be exclusive, cannot be regarded as waived or forfeited by the omission to apply within the statutory time for a change of location. The provisions in respect to those applications are intended for a different purpose, and neither they nor the provisions in respect to crossings can be used as a means of enabling a railroad company to enter upon lands which are already so appropriated to one public use that they cannot consistently with that use be taken for another. To accomplish such a purpose legislation pointed to that end is required. The existing statutes do not appear to have any such object in view.

The order should be affirmed, with costs.

All concur, except DANFORTH, J., who concurs, except as to verification of petition. and on that point dissents.

Order affirmed.

IN THE MATTER OF THE PROCEEDING OF THE BOSTON,
HOOSAC TUNNEL AND WESTERN RAILWAY COMPANY, TO
ACQUIRE THE RIGHT TO CROSS THE RAILROADS OF THE
TROY AND BOSTON RAILROAD COMPANY, AND THE TROY
AND BENNINGTON RAILROAD COMPANY.

Under the provision of the railroad act (sub. 6, § 28, chap. 140, Laws of 1850), authorizing proceedings by one railroad company to acquire the right to cross the railroad of another company, an attempt to agree with such other company as to the points and manner of crossing, and as to the amount of compensation, is a condition precedent to the authority of the court to appoint commissioners; and unless this is averred in the petition, there is no jurisdiction.

Where one railroad company has leased the road of another, such lessee is a necessary party to a proceeding under said provision by a third company, to acquire the right to cross the leased road; it may volun-

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tarily agree with the petitioner in respect to the crossing, and such agreement, while not binding upon the lessor, in respect to its interests as reversioner, binds the interests of the lessee.

In such case it is not essential that the proceeding shall embrace all the parties; it will only affect the parties brought in, and where the lessee is alone made a party, the estate in reversion will not be affected.

Where, therefore, such proceedings were instituted nominally against both lessor and lessee, but the petition contained no allegations of an attempt to agree with the lessor as to the points or manner of crossing or compensation, but did contain such allegations as to the lessee, *held*, that an order granting the prayer of the petition was proper, so far as it provided for the appointment of commissioners, as against the lessee, but was erroneous so far as it affected the lessor.

(Argued November 11, 1879; decided November 25, 1879.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, affirming an order of Special Term, appointing commissioners to fix the points and manner in which the said The Boston, Hoosac Tunnel and Western Railroad Company shall be allowed to cross the tracks of the Troy and Boston Railroad Company, and the Troy and Bennington Railroad Company, and the compensation to be made therefor.

The petition stated that the road sought to be crossed belonged to the Troy and Bennington Company, but was leased by it to the Troy and Boston Company, and was operated by the latter company. The petition averred that the petitioner had applied to the Troy and Boston Company to agree on the points and manner of the crossings and the compensation therefor, but that such an agreement had been refused by said company. No allegation was contained in the petition as to any attempt to agree with the Troy and Bennington Company. The order of Special Term appointed commissioners to determine the points and manner of crossing and the compensation to be made to both the companies named.

Ezek Cowen and Samuel Hand, for appellant. The order of the Special Term is void, because there is no allegation

Opinion of the Court, per ANDREWS, J.

in the petition that any attempt has been made to agree with the Troy and Bennington Railroad Company as to the points and manner of crossing, or the compensation to be made therefor. (*N. Y. and Bost., R. R. v. Godwin*, 12 Abb. [N. S.], 21; *Watson v. N. Y. C. R. R.*, 47 N. Y., 157.)

E. W. Paige, for respondent. The court correctly ruled all the answers after the first to be immaterial. (*Matter of Buff. and L. R. R.*, 77 N. Y., 557; 15 Hun, 365.)

ANDREWS, J. It is a fatal objection to the order in these proceedings, so far as the rights of the Troy and Bennington Railroad are involved, that the petition does not show that any attempt has been made to agree with that company as to the points or manner of crossing its road or the compensation to be made therefor. This is a jurisdictional fact. The attempt and failure to agree is a condition precedent to the authority of the court to appoint commissioners, and unless this is averred in the petition, there is no jurisdiction. This point has been ruled by this court in *In re the Lockport and Buffalo Railroad Co.* (77 N. Y., 527). The appeal of the Troy and Bennington Railroad must, therefore be sustained.

But we think the order may be upheld as to the Troy and Boston Railroad. That road is the lessee of the Troy and Bennington Railroad, operating it under a perpetual lease. The Troy and Boston Railroad was a necessary party to a proceeding under the sixth subdivision of section twenty-eight of the general railroad act for the appointment of commissioners. That corporation is a company whose railroad is intersected by the railroad of the petitioner, within the meaning of that section, and I see no reason to doubt that it might have voluntarily agreed with the petitioner in respect to the crossing by the petitioner's road. Such agreement would not have been binding upon the Troy and Bennington

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Railroad in respect to its interest as reversioner, but would bind the interest of the lessee. There is nothing in the statute which requires that the proceeding for the appointment of commissioners, in such a case as this, should embrace all parties who, either as lessees or reversioners, have an interest in the railroad which may be crossed by a new line. The proceeding will only affect the parties who are brought in; and where the lessee is made a party alone the estate in reversion will not be affected by it. The other questions have been determined in the case of this petitioner against the Troy and Boston Railroad Company, just decided. We are of opinion that the order should be affirmed, so far as it provides for the appointment of commissioners, as against the Troy and Boston Railroad, and reversed as to the Troy and Bennington Railroad, without costs to either party.

All concur.

Ordered accordingly.

SOPHIA KELLOGG, Executrix, etc., Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

It is not, as matter of law, negligence for a person approaching a railroad in a carriage, upon a highway, not to stop; his omission to do so is a fact to be submitted to the jury.

In an action to recover damages for alleged negligence, causing the death of C., plaintiff's testator, who was killed at a railroad crossing, it appeared that the railroad track runs north and south, the highway east and west; at the crossing and on both sides thereof there was a cutting for the railroad track; and one also for the highway east of the track seven or eight feet deep, for a considerable distance, with a board fence, and other obstructions to view on the top of the embankment to the south. C. approached the crossing from the east, in a one-horse wagon. He was driving at a very slow trot with one hand, holding a rail in the other;

79	72
112	243

79	72
158	604

79	72
j 162	30

79	72
164	153

79	72
167	24

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the train, by which he was killed, came from the south at a high rate of speed, and as plaintiff's evidence tended to show, without ringing a bell. C. was familiar with the crossing, and with the running of trains; he approached the crossing about the time trains were due both ways; the wind at the time was blowing from the north; C. was seen a moment before he was struck by the engine looking towards the north. *Held*, that the questions of negligence on the part of defendant and contributory negligence on the part of C. were of fact for the jury. In such an action evidence, on the part of the defendant, that the life of the deceased was insured is incompetent.

(Argued November 13, 1879; decided November 25, 1879.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, setting aside a verdict in favor of plaintiff and granting a new trial.

This action was brought to recover damages for the alleged negligence of defendant, causing the death of Caleb S. Kellogg, plaintiff's testator.

The deceased was struck and killed by an engine attached to a train upon defendant's road, as he was crossing its track at a highway crossing.

Defendant's counsel offered to prove on the trial that the life of the deceased was insured. This was objected to and rejected and said counsel duly excepted.

The circumstances of the accident are sufficiently stated in the opinion.

Exceptions were ordered to be heard in the first instance at General Term.

John H. Martindale, for appellant. Evidence that the life of plaintiff's testator was insured was incompetent and immaterial. (38 Barb., 589; 34 N. Y., 208; 72 id., 26-32; *Althorp v. Warner*, 2 Hilt., 344.) Negligence cannot be imputed to the testator because he did not look where he could not see the approaching train. (*Dyer v. Erie R. Co.*, 71 N. Y., 236; *Massoth v. D. and H. C. Co.*, 64 id., 529; 47 id., 400; *Bull's Case*, 31 id., 314; *Stokes v. Saltonstall*, 13 Pct. [U. S.], 181.) The question of the testator's negligence was for the jury. (*Ernst's Case*, 35 N. Y., 26,

27; *Weber's Case*, 58 id., 457; 17 Wall., 357; 71 N. Y., 185.)

W. H. Adams, for respondent. Plaintiff should have been nonsuited on the ground of contributory negligence. (*Hackford, Admr.*, v. *N. Y. C. and H. R. R. Co.*, 53 N. Y., 654; *Wilds v. H. R. R. Co.*, 24 id., 430; *Wilcox v. R. and W. R. R. Co.*, 39 id., 358; *Havens v. Erie R. Co.*, 45 id., 296; *Gorton v. Erie R. Co.*, 45 id., 660; *Reynolds v. N. Y. C. and H. R. R. Co.*, 58 id., 248; *McGrath v. N. Y. C. and H. R. R. Co.*, 59 id., 468; *Mitchell v. N. Y. C. and H. R. R. Co.*, 64 id., 655; *Cordell, Admr.*, v. *N. Y. C. and H. R. R. Co.*, 8 W. Dig., 74; *Salter, Admr.*, v. *U. and B. R. R. Co.*, 8 id., 188.) The presumption that the testator did look in both directions does not supply the place of proof. (*Reynolds v. N. Y. C. and H. R. R. Co.*, 58 N. Y., 248; *Cordell v. N. Y. C. and H. R. R. Co.*, 8 W. Dig., 74.) Proof that the testator's life was insured was competent, as the plaintiff could only recover such actual pecuniary damages as have been sustained by the next of kin of the person killed. (Laws of 1870, chap. 78; *McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y., 287; *Tilly v. H. R. R. Co.*, 24 id., 471.)

EARL, J. Upon the trial of this action the court denied the motion of the defendant to nonsuit the plaintiff upon the ground that the evidence failed to show any negligence on its part, and upon the ground that it did show contributory negligence on the part of the deceased.

The only negligence on the part of the defendant submitted to the jury was its omission to ring the engine bell at the crossing. While there was a great preponderance of evidence that the bell was rung, we cannot say that there was not some conflict in the evidence upon that question proper for submission to the jury. There was some evidence tending to show that the bell was not rung, and we cannot say as matter of law that the jury was bound to disregard it.

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The verdict was set aside and a new trial granted at the General Term, upon the ground that upon the undisputed facts of the case there was contributory negligence on the part of the deceased. To determine whether the decision of the General Term was right, a careful consideration of all the evidence is required. We have given the evidence such consideration and are compelled to differ with the General Term.

It would serve no useful purpose now to specify minutely the evidence which controls our judgment. The deceased lived near the crossing, and was familiarly acquainted with it and with the running of the trains. The railroad track runs north and south, and the highway east and west; and the deceased approached the crossing about the time trains were due both from the north and south. He was in a one-horse wagon approaching the crossing from the east, and the train by which he was killed came from the south. He was driving his horse upon a very slow trot with one hand, and holding a pail of butter in the other hand. The wind at the time was blowing from the north and the train was run at a high rate of speed. At the crossing and on both sides thereof there was a cutting through the earth for the railroad track seven or eight feet deep, and that the highway could cross the track upon the same level, there was a cutting for it east of the railroad of the same depth for some considerable distance. The deceased was seen a moment before he was struck by the engine looking towards the north from which a train was then about due. It is claimed that he ought to have looked also toward the south, and that if he had, he would have escaped harm; and it is also claimed that if he had listened he would have heard the approaching train.

We must assume now that the bell was not rung, and hence that the only warning to the sense of hearing was the noise made by the running of the train. But it cannot be said positively that he would have heard the train if he had listened. The distance to which a train can be heard depends

upon the nature of the track, the state of the atmosphere, the direction of the wind, and the absence or presence of intervening obstacles. He was in the cutting and there were trees, shrubbery and buildings intervening to a greater or less extent. Whether, under such circumstances, by the exercise of ordinary prudence, he did or could have heard, was a question, upon all the facts proved, for the jury.

It is unquestionably true that the deceased was bound to exercise his sight to avoid danger at the crossing. He was not bound to the greatest diligence which he could have exercised in that way: but he was bound to exercise such care as a prudent man approaching such a place would ordinarily exercise for the protection of his life. Did he exercise such care? Or, in other words, was there an entire absence of evidence that he did? The witnesses differ considerably as to the extent of the obstacles between him and the approaching train. There were buildings, trees, shrubbery, the embankment on the south side of the road, and upon that a board fence. To what extent he could have seen this rapidly approaching train if he had looked at various points in the highway, is uncertain. That the obstructions would greatly interfere with his sight is certain. There was no proof that he was heedless. He was apparently aware of the danger. A train was at that time to be expected from the north, and there was also some obstruction interfering with sight in that direction. For a moment before the collision he was looking in that direction. We cannot say that at that particular time he should have looked toward the south. Under all the circumstances surrounding the accident, we think it was for the jury to determine whether he exercised that care which the law required of him. He could probably have avoided the accident by stopping before he passed upon the track. But that is a degree of care not usual even with very prudent persons. It has not been decided by the courts of this State that a person approaching a railroad is bound as matter of law to stop, to avoid the imputation of negligence. There may

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be cases in which a traveler ought to do so, and if he omits to do so, it would be one of the facts, with all the others, to be submitted to the jury.

There is considerable evidence in this case of measurements and experiments to show how a train approaching this crossing from the south could be seen from various points on this highway. Such evidence is frequently very reliable and satisfactory. But it is not necessarily conclusive. Such experiments are made when the witnesses are calm and their whole minds, free from any distractions, are intent upon the matter in hand. They cannot be made under the precise circumstances which attended the transaction to be investigated. There may be a slight change in the intervening obstacles, and the speed of the approaching train is not there. They do not show conclusively what ought to have been seen by a man having a horse to manage and his attention somewhat distracted by the expectation of a train from the opposite direction.

It seems to have been supposed at the General Term of the Supreme Court that our decision in the case of *Salter v. The Utica and Black River Railroad Co.* (75 N. Y., 273) controls this case. But without taking time to point out the differences between that case and this, it is sufficient to say that the facts of no two cases are alike. There are many circumstances here which did not exist in that case. We have laid down in many cases the principles which are to govern in the decision of this class of cases. Those general principles are to be applied to the cases as they arise, and in their application to this case we are constrained to differ from the learned court below.

The proof offered to show that the life of the deceased was insured was properly rejected: (*Terry, Adm's. v. Jewett, Rec'r.*, October 7, 1879, recently decided.*)

Other exceptions to which our attention was called upon the argument do not require particular notice. They point out no error prejudicial to the defendant.

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The order of the General Term must be reversed and judgment upon the verdict ordered for the plaintiff, with costs.

All concur.

Ordered accordingly.

79	136
113	202
79	78
131	535

FRANCIS M. EMERY, as Executrix, etc., Respondent, v
JOHN T. WILSON, Appellant.

E. plaintiff's testator, defendant and one S. entered into a co-partnership in 1865, "for so long a time as they shall mutually agree," E. to receive one-tenth, defendant four-tenths and S. five-tenths of the net profits. For the year 1872, E. received a greater proportion, defendant a less, S. the same. On January 1, 1873, defendant executed an instrument by which he agreed to pay E. "four and three-eighths per cent of the net ascertained profits" of the firm "during the year 1873." E. remained in the firm, receiving during the year the share of profits stated in the original agreement. In an action upon the instrument *held*, that the facts authorized an inference that E. consented to continue the co-partnership, in consequence of the promise of defendant; and that this was a sufficient consideration for the promise.

Upon the death of S. defendant brought an action for an accounting and settlement of the partnership affairs. E. set up in his answer therein that he was entitled, for the year 1873, by agreement, to a greater percentage of profits than that specified in the co-partnership agreement. On the trial he offered in evidence the instrument above described, which was rejected. *Held*, that the former action was no bar to this; that the undertaking of defendant was an individual one having no relation to the partnership or its affairs, as such.

By the articles of co-partnership it was provided that quarterly accounts should be taken and settled between "the co-partners, to the intent that it may thereby appear what are the net profits." *Held*, that it was proper to take the quarterly statements so taken, and entered upon the books for the year 1873, as the "net ascertained profits" upon which the percentage was to be paid by defendant; and that it was no error for the referee to refuse to deduct from the profits so ascertained the depreciation in value of the firm property.

(Argued November 14, 1879; decided November 25, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming

Statement of case.

a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought by plaintiff, as executrix of the will of James W. Emery, deceased, upon the following instrument executed by defendant.

“NEW YORK, *January 1*, 1873.

“I hereby agree to pay to Mr. James W. Emery four and three-eighths per cent of the net ascertained profits of the existing firm of John T. Wilson & Company, as the same may be during the year 1873.

“JOHN T. WILSON.”

Said Emery, the defendant, and one Alexander Simpson, entered into co-partnership in October, 1865, as stated in the articles of co-partnership “for so long a time as they shall mutually agree thereto.” Said articles contained the following clauses :

“Twelfthly. That, on the first day in the months of January, April, July and October, or within two days thereafter, in each year, a full and perfect account of the co-partnership affairs shall be taken, had and settled between the parties hereto, to the intent that it may thereby appear what is the capital stock of said co-partnership and what are the net profits thereof, and there shall be accredited to each of the members of said firm, interest at seven per cent on the amount of his capital as it stood on the day of the last preceding accounting ; and there shall be debited to each of the members of said firm interest at seven per cent on all sums of money charged to his debit since the day of the last preceding accounting, and of the said net profits ; the said John T. Wilson shall be entitled to four-tenth parts thereof ; the said Alexander Simpson to five-tenth parts thereof, and the said James W. Emery, to one-tenth part thereof.

“And it is agreed that each of said parties hereto may on each such settlement withdraw, from said co-partnership funds, the whole or such part as they may together all agree

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upon of the net profits appearing on said account to have been realized during the preceding quarter.

“And it is hereby agreed that the accounts so made up and settled shall be entered in the books of the said co-partnership and be subscribed by each of the parties hereto.”

The co-partnership so entered into continued until the death of Simpson in October, 1873; the surviving partners continued it until the end of that year. The referee found that a change was made in the agreement for the year 1872, so that for that year Emery received about eighteen per cent and defendant about thirty-two per cent of the profits; that on or about January 1, 1873, it was agreed that the proportion should be as specified in the articles, defendant at the same time executing and delivering the instrument in question; that the same was an independent and individual undertaking by defendant and constituted a part of the consideration which induced Emery to consent to the continuation of the co-partnership relations and to accept the reductions then made in his share of the profits.

He also found: “That the term ‘net ascertained profits,’ as used in said memoranda, referred to the profits of the business, as they should be ascertained from time to time, and carried into the books of the firm, for the year 1873, in the ordinary course of business, and not to the profits for that year, as they might be ascertained by final accounting upon the winding up of the said co-partnership.” The referee therefore took the entries upon the books as to the amount of profits.

It appeared that on or about the 24th day of February, 1876, the defendant commenced an action against Emery, and the personal representatives of Simpson, for the purpose of an accounting and winding up of the affairs of the co-partnership. Emery in his answer set up, among other things, that by agreement of the parties he was to have, for the year 1873, a greater share than that specified in the articles. The referee found that Emery presented the claim in this action to the court in the said suit, but the same was finally

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rejected and disallowed on Wilson's objection, that the same did not constitute any part of said co-partnership affairs, but was wholly a private matter between him and Emery, to which view the plaintiff assented, and thereupon abandoned the same as a proper subject for consideration in that action.

The judgment in the former suit defendant pleaded as bar herein.

Samuel Hand, for appellant. In order to sustain an action on the agreement made by Wilson in January, 1873, extrinsic evidence of a consideration must be produced by the plaintiff. (*Geer v. Archer*, 2 Barb., 426; *Silvernail v. Cole*, 12 id., 685; *Ehle v. Judson*, 24 Wend., 93; *Winchell v. Latham*, 6 Cow., 682) The former adjudication is a finality, as to the claim now in controversy, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to every other matter which might have been so offered. (*Secor v. Sturgis*, 16 N. Y., 548; *O'Beirne v. Lloyd*, 43 id., 248; *Embury v. Conner*, 3 Comst., 511; *Cromwell v. County of Sac.*, 94 U. S. [4 Otto], 351; *Kidder v. Horrobin*, 72 N. Y., 159.) If the agreement in suit was a part of the consideration to Emery to give his services to the partnership for the year, then it was clearly either a part of the partnership arrangement, and a subject of adjudication in the former suit, or it was wholly a *nude pact*, as a partner is not entitled to compensation for his services. (*Caldwell v. Leiber*, 7 Paige, 483.) If the agreement of 1873, as between Wilson and Emery was to affect a change in their partnership relations as to their respective shares in the partnership, then it related to the partnership affairs, and was involved in the other suit to settle the partnership. (*Jackson v. Parkhurst*, 5 J. R., 128; *Hopf v. Myers*, 42 Barb., 278.) The agreement in suit was the subject of a counter-claim. (Code, § 501, subd. 1; *O'Beirne v. Lloyd*, 43 N. Y., 248.)

Opinion of the Court, per DANFORTH, J.

Jesse Johnson, for respondent. The paper in suit was given for a sufficient consideration. (*Andrews v. Pontue*, 24 Wend., 285; *Barton v. McLean*, 5 Hill, 256; *Justice v. Lang*, 42 N. Y., 493; *Graham's Synonymous and Webster's Dictionary on Words "to agree" and "agreee."*) The parties to an action are not competent to prove either a transaction or the absence of a transaction with deceased as against the deceased's representatives. (*Howell v. Van Siclen*, 5 Hun, 115; *Herr v. McGuire*, 28 N. Y., 452; *Barrett v. Carter*, 3 Lans., 68; 2 Abb. [N. C.], 16, 17, note.)

DANFORTH, J. The writing on which this action is brought amounts to something more than a naked promise on the part of the person signing it. It indicates a contract having the consent of Wilson and Emery to the stipulations expressed in or to be fairly implied from it. Although signed by Wilson only, it was accepted by Emery, and its cause or consideration sufficiently appears. It is dated January 1, 1873, refers to the firm of John T. Wilson & Company, as then existing, and the undertaking on the part of Wilson could become operative only by its continuance, for it is according to the sum of profits of the firm as ascertained during that year, that Emery is to be paid. He was under no obligation to remain in the firm, and it is not unreasonable to infer that Emery consented to continue a member of the co-partnership in consequence of Wilson's promise, and that the promise of Wilson was made to induce that consent. There was then a reciprocal agreement between the parties. This view is strengthened by the fact that from the time of this contract, Emery did remain in the firm, and Wilson received from the firm business a larger share of profits than he had received during the year 1872. and Emery received less. Some agreement must have led to this change, and the fact itself throws light upon the contract, indicates a connection between it and the result referred to, and a sufficient inducement for Wilson's promise. In the next place it is obvious that the undertaking disclosed

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by the writing is that of Wilson separately, and has no relation to the partnership or its affairs as such. It did not affect Simpson, the other partner, or purport to do so. His share of the profits remained at all times the same, and as he was not a party to the agreement in question, neither does it appear that he was in any manner privy to it, or that Wilson assumed to act for him. It must be construed according to its terms, and, so construed, imposed an individual liability upon Wilson and upon no other person. (*Burnett v. Snyder*, 76 N. Y., 344.) Nor was it improper to measure this liability of Wilson according to the profits appearing from the entries upon the books of the firm for the year 1873. The partnership articles under which in 1865 the firm of John T. Wilson & Company was formed, provided that the transactions of the co-partnership should be entered in its books so as to exhibit from time to time the condition of its affairs and that on the first day of January and every three months thereafter in each year, a full and perfect account of its affairs "should be taken, had and settled" between "the co-partners to the intent that it may thereby appear what are the net profits;" and it was undoubtedly in reference to these provisions that the term "net ascertained profits," was selected as the measure of Wilson's obligation under the contract in question. Nor did the referee err in refusing to deduct from the profits so ascertained, the amount of the depreciation in value which the property of the firm had undergone. The arrangement between Wilson and Emery did not contemplate a final winding up or settlement of the affairs of the firm of John T. Wilson & Company before payment to Emery should be made, but only that the profits of the business of the firm for the year should be ascertained or stated in the manner before referred to. The extent of Wilson's obligation was limited only by the profits so ascertained. It follows from these considerations that the accounting had in the winding-up suit between the partners or their representatives was no bar to the present action. It appears,

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however, that upon the hearing thereof the contract now before us, and Emery's claim under it, were offered by the plaintiff for the consideration of the referee, but on motion of the defendant it was excluded on the ground that "it gave Emery no specific interest or lien upon the property of the firm," and so was not within the issue in that action. It is evident, therefore, that the demand now in suit was not in fact considered in the former action, and except by consent of all parties it could not have been.

There is no reason, therefore, why the judgment of the court below should not be affirmed.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN S. ROSS, Appellant, v. ELIZABETH HARDIN et al.,
Administratrix, etc., Respondents.

The rule of law that, from a request to perform services, an implied promise arises to pay what the services are worth, does not apply where the services are rendered by one in the employ of the person making the request; in such case the implication is that the services were rendered under the contract of employment, particularly if the services are of the same character as those embraced in that contract.

As to whether a contract may be made by a person during his life, for the preservation and safety of his property after his death, and until administrators are appointed, *quære*.

If such a contract can be so made with an employe who has had similar services to perform during the life of the employer, unless the parties stipulate for a different compensation, it will be presumed that the same rate of compensation paid before the death of the employer continues thereafter.

Plaintiff prior to the death of H., defendant's intestate, had been in his employ as confidential clerk, at a salary of sixty dollars per month. H. owned a large amount of stocks, bonds, securities and money, which were kept in a box deposited in a bank. Plaintiff frequently had charge of them; he brought the box to the house of H at his request. Two days before his death, H. told plaintiff to take charge of the box, and put it in the Safe Deposit Company; this he did. Eight days after the death

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of H., and upon the appointment of defendants as administrators, plaintiff delivered the box to them. In an action to recover the value of the services so rendered, plaintiff was nonsuited. *Held*, that conceding the employment valid, and the estate liable, plaintiff was entitled to recover only at the same rate of compensation he received during the life of H., and the non suit was not strictly correct; but as this claim was not made upon the trial or in this court, plaintiff claiming to be entitled to compensation as upon a *quantum meruit*, the maxim "*de minimis non curat lex*" would be applied; judgment, therefore, affirmed.

(Argued November 17, 1879; decided November 25, 1879.)

APPEAL from judgment of the General Term of the Superior Court, of the city of New York, affirming a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial, and affirming an order denying a motion for a new trial.

This action was brought to recover as upon a *quantum meruit*, for services alleged to have been rendered by plaintiff, at the request of George Hardin, defendant's intestate, in taking charge of and caring for his property.

The facts are sufficiently set forth in the opinion.

Nathaniel C. Moak, for appellant. Where one person performs services for another, the law presumes and implies a promise on the part of him, at whose request the services are performed, to pay the person performing them what they are, under all the circumstances, reasonably worth. (*Moore v. Moore*, 3 Abb. Ct. App. Dec., 312; 21 How. Pr., 223; *Darling v. Halsey*, 12 Hun, 90; *Gallagher v. Vought*, 8 id., 87, 88; *Woodward v. Bugsbee*, 2 id., 128; *Thornton v. Grange*, 66 Barb., 507; *Lewis v. Trickey*, 28 id., 387, 390, 391; *Williams v. Hutchinson*, 3 N. Y., 318; *Wood's Master and Servant*, § 67.) The defendants were liable as administrator and administratrix upon the contract made by George Hardin, the deceased. (*De Valengin v. Duffy*, 14 Peters, 290; *Baring v. Putnam*, 1 Holmes [U. S.], 261; *Bell v. Lewis*, 44 Ind., 129; *Taylor v. Mitchell*, 36 Leg. Inst., 97; *Foland v. Stevenson*, 59 Ind., 485; *Bradbury v. Morgan*, 1 Hurl. & Colt., 249; *Fennell v. McGuire*, 21 U.

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C. C. Pl., 134; *Foland v. Wells*, 59 Ind., 529; *McDaniel v. Parks*, 19 Ark., 671; 2 Williams on Exrs. [6th Am. ed.], 1824-1830, pp. 1721-1728, bottom paging; *Smith v. Wilmington*, 83 Ill., 498; *Segar v. Atkinson*, 1 H. Bl., 102; *Powell v. Graham*, 7 Taunt., 580; 2 Eng. C. L. Rep., 501; *Fitzhugh v. Fitzhugh*, 11 Gratt., 302; *Petrie v. Voorhies*, 18 N. J. Eq., 290; *Taylor v. Taylor*, 3 Bradf., 54; *Davis v. Stover*, 58 N. Y., 474; 14 Peters [U. S.], 290; 1 Holmes [U. S.], 261; *Lewis v. Trickey*, 20 Barb., 387; *Ex parte Tindal*, 8 Bing., 404; 3 Redf. on Wills, 274, chap. 10, § 39; id., 277; *Hyde v. Skinner*, 2 P. Wms., 196, 197; *Frederick v. Frederick*, 1 id., 710, 721; *Wilkes v. Ferris*, 5 J. R., 335; *Gray v. Davis*, 10 N. Y., 285; *Conner v. Shaw*, 3 M. & W., 350, 352; *Prior v. Hembrow*, 8 id., 889, 890; Broom's Leg. Max., 704, 705; *Taylor v. Taylor*, 3 Bradf., 54; Williams' Exrs., 1466-1619; Sugden's V. & P., 180; 10 Ves., 597, 614; *Wentworth v. Cock*, 10 Ad. & Ell., 42; 37 Eng. C. L., 47; 2 R. S. at Large, 117, § 2; 1 Parsons on Con. [6th ed., 1873], 130, 131, note 7; Redf. L. & Pr. Surrogates' Courts, 248, art. 6, § 2; *Bachelor v. Fisk*, 17 Mass., 469; *Stewart v. Eden*, 2 Cal., 121, 128-129; *Ord v. Fenwick*, 3 East, 104.) Plaintiff having taken care of the property of the deceased was entitled to compensation for his services without any agreement to pay for the same. (*Sheldon v. Sherman*, 42 N. Y., 84; 42 Barb., 368, 372.) When the facts of a case are undisputed, but the inference to be drawn from those facts can be decided for either side, the case, under such circumstances, is not one of law for the court, but must be submitted to the jury for their determination. (*Howell v. Gould*, 3 Keyes, 422; *Hackford v. N. Y. C. R. R. Co.*, 53 N. Y., 654; *Smith v. Coe*, 55 id., 678; *Nousry v. Lord*, 2 Keyes, 617.) The jury were justified by the evidence in finding a special contract by deceased employing plaintiff. (*Sheldon v. Sherman*, 42 N. Y., 484; affirming 42 Barb., 368, 372.) Executors and administrators may bind the estate by a promise to pay for services which were necessary for its protection and preservation. (*Davis v. Stokes*, 58 N. Y.,

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474; *Benjamin v. Taylor*, 12 Barb., 328.) There was such a promise founded upon a good consideration which bound the estate. (14 Peters [U. S.], 290; 1 Holmes [U. S.], 261.)

John E. Burrill, for respondents. The only cause of action which could be proven, or for which a recovery could be had herein, was one which accrued on a contract for which the deceased in his life-time was liable, and for which the defendants were liable in their representative capacity. (*Benjamin v. Taylor*, 12 Barb., 328; *Austin v. Munro*, 47 N. Y., 360; *Ferrin v. Myrick*, 41 id., 315, 320.) The consideration arose after the death of the intestate, and the cause of action, if any, was against the defendants individually, and not in their representative capacity. (41 N. Y., 319, 320; *Demott v. Field*, 7 Cow., 58; *Meyer v. Cole*, 12 J. R., 349; *Gillett v. Hutchinson*, 24 Wend., 184.) Even if the administrators would have been entitled to charge or reimburse themselves out of the estate, for moneys paid in satisfaction of such claim, it does not follow that an action could be maintained against them as administrators. (*Ferrin v. Myrick*, 41 N. Y., 325; *Austin v. Munro*, 47 id., 366.) If the alleged agreement between Ross and Hardin was to take effect upon the death of Hardin, it was not a valid or binding contract either upon Hardin or upon his representatives. (*Harris v. Clark*, 3 N. Y., 93, 98, 107, 113; Chitty on Cont., chap. 1, § 1, sub. 2; Gratuitous Promise [inarg. p.], 50-52; *Kellogg v. Olmstead*, 25 N. Y., 189; *Van Allen v. Jones*, 10 Bosw., 360; *Hunt v. Bloomer*, 5 Duer, 202.)

CHURCH, Ch. J. The plaintiff's counsel made several requests to submit questions of fact to the jury, the refusal of which is claimed to be error, and also the refusal to charge based upon the hypothetical finding of the jury.

1st. Whether the services claimed for were rendered by the plaintiff, under a promise expressed or implied by the intestate that he should be paid therefor, and if they should so

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find, the court was requested to charge that the plaintiff was entitled to recover what the services were reasonably worth.

2nd. Whether such services were rendered and performed, under a new and independent contract by the deceased, with the plaintiff, to pay therefor what such services were reasonably worth, and if they should so find, requested the charge that the plaintiff was entitled to recover accordingly.

3rd. Whether the services were within the reasonable scope of the plaintiff's employment as confidential clerk, and if they should so find, and that they were to be paid for, then the measure would be the reasonable value of the services. These requests were made in different forms, and an exception duly taken to each refusal.

The case has been three times tried in the Superior Court. Upon the first two trials the plaintiff had a verdict, and upon the last a nonsuit was granted. The question presented, whether the court erred in granting a nonsuit, involves the questions presented in the requests. If there was any material question of fact which ought to have been submitted, it was error to direct a nonsuit.

The deceased was a man of large wealth, and the plaintiff had been his confidential clerk for eleven years, at a salary of sixty dollars a month. The property, valued at \$1,500,000, in stocks, bonds, securities and money, was kept in a tin box, and had been deposited in the Bank of the State of New York. On the 4th of March, 1872, the intestate directed the plaintiff to bring the box to his house, which he did. The intestate was then sick and very low. He opened the box, and locked it, and gave the key to the plaintiff, and there is evidence tending to show that he told the plaintiff "to take charge of the box, and put it in the Safe Deposit Company, until James Gray arrives from Ireland."

He also told him to separate the securities to the extent of half a million of dollars, and get another box, and put James Gray's securities in it. The box remained at the

house until the sixth of March, when the intestate died. The plaintiff then took the box to his own house, where it remained over night, and the next day he deposited it in the Safe Deposit Company in his own name, where it remained until the fourteenth of March, when he delivered it to the defendants, who had been appointed administrators. The plaintiff testified that a large portion of the securities stood in his own name (for convenience of transfer probably), and he also testified as follows :

A. "I was the only clerk he had ; I did all his business.

Q. Had you charge of the securities ?

A. Yes, sir, repeatedly.

Q. Were they intrusted to your care ?

A. Yes, sir, for weeks at a time.

Q. During the whole time ?

A. Yes, sir."

From these facts the plaintiff's counsel contends that the jury would have been justified in finding that this was an independent agreement, not connected with his employment as clerk, and that it was intended to continue after the death of the intestate. Even if the last position is correct, it would not necessarily entitle the plaintiff to extra compensation, unless the first was also found. As to the first proposition giving the most favorable construction to the evidence on the part of the plaintiff as we are required to do in considering the propriety of a non suit, it seems to me that there is nothing in the facts developed, upon which such an inference can be predicated. There was not a word said by the intestate indicating that the service to be performed by the plaintiff was regarded by him as different or more onerous in any respect, than the duties which for eleven years he had performed, and still less if possible, that he intended to incur any additional obligation for such service. Nor is there anything in the circumstances evincing such intention.

Although the intestate was very low, and may have apprehended death within a short period, he was able to comprehend the nature and extent of his property, and indicated the

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securities which he wished set apart for Mr. Gray. He then directed his clerk to put the box in the Safe Deposit Company. It is argued that the duty imposed was different from his ordinary duties as clerk, and therefore that an inference may be drawn of an intention to make an independent contract. How different? Not in the kind of service, for the plaintiff had done the same thing repeatedly for eleven years; not in the labor, for it consisted merely in taking the box to the depository which the plaintiff had before often done. It is said that it greatly increased his responsibility. If this was so it would not be decisive, but I am unable to see wherein his responsibility was increased. He was not required, and had no authority to invest the securities, or in any manner use them. It was not contemplated even that he should have the personal custody of the property. The direction was to take the box to a safe depository. It was not contemplated that he should take the box to his own house, over night, and if anything had happened to it by reason of his doing so, he might have been in fault. When the box was deposited, he was relieved from personal risk or responsibility for its safety. The learned counsel for the plaintiff invokes the rule of law that from a request to perform services, an implied promise arises to pay what such services are reasonably worth, and in some cases the law will imply a request from the beneficial nature of the services, or their acceptance by the party. (*Gallagher v. Vought*, 8 Hun, 87; *Woodward v. Bugsbee*, 2 id., 128; *Williams v. Hutchinson*, 3 N. Y., 318; *Wood's Master and Servant*, §67.) This rule has no application when the request is to a member of the promissor's family, for the reason that the relation between the parties repels the presumption of a promise to pay, and raises a contrary presumption that the service was to be gratuitous. (Id., §72.) Nor does the rule apply when the services are rendered by one in the employ of the person for whom they were rendered. In such cases the law implies that the services were rendered under the contract of employment, unless the con-

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trary be shown, and this implication is much stronger if the services are of the same character as those embraced in the contract. In *Carr v. Chartier's Coal Co.* (25 Penn. St., 337), a secretary of a coal company attempted to retain \$200 for "extra services." This was refused, Judge BLACK saying, that he was bound to do "whatever his employers may have occasion to employ a secretary about." The plaintiff had the key, and was authorized if not required to deposit the box before the testator died. The service commenced therefore during the testator's life, and it is claimed that it was intended to be continued after his death. The evidence to establish this is slight, but assuming that such an inference can be drawn, then two questions arise. One is whether it is lawful for a person to contract for the care of his property after his death, and if he may, and this is deemed such a continuing contract, whether the plaintiff is entitled to compensation as upon a *quantum meruit*, or at the same rate agreed upon as clerk. It is very clear, I think, that a person cannot by a contract supersede or contravene the laws in respect to the management, and devolution of property in cases of intestacy. The statute has provided a mode of doing this by will, but the requirements of the statute must be complied with. But a contract made during the life of a person, commencing previous to his death, or even at his death for the preservation and safety of his property until the lawful authority is exercised by the appointment of administrators, is not so objectionable, and I do not see either in considerations of public policy, or in reason, why this may not be done, but it is not necessary definitely to determine the point. If it may be done the estate would be liable, and the administrators might be sued as such. (*Foland v. Stevenson*, 59 Ind., 485; *Bradbury v. Morgan*, 1 Hurl. & Colt., 249; *Collins v. Weiser*, 12 Serg. & Rawle., 97; *Hill v. Roberson*, 2 Smedes & Marsh., 541.)

Giving the plaintiff the benefit of this position, the question is, at what rate was compensation to be made. It will not do to say that the parties are presumed to know that

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their previous contract ceased upon the death of the intestate, and therefore that they must have intended a *quantum meruit*. The proposition itself is based upon the assumption that it did not cease, but was intended to continue after death, and if so, it must be presumed that the same rate of compensation continued after, as before, unless the parties stipulated for a different compensation. As no such stipulation was made the presumption of law must prevail. One reason for the presumption is, that if an increase was expected by the employed, he would have applied for it to his employer, as would be natural and usual in human dealings. By making no such application, and his employer not indicating that he intended to pay any additional compensation, the inference of fact, as well as of law is very persuasive that neither party intended that it should be increased. (*Ranck v. Albright*, 36 Penn. St., 367; *Wallace v. Floyd*, 29 id., 184; *N. H. Iron Factory v. Richardson*, 5 N. H., 294; *Huntington v. Claflin*, 38 N. Y., 182.) This view disposes of all the grounds urged for maintaining the action. All that can be said in respect to the relations of the plaintiff to the property after the death of the deceased is that it increased somewhat the temptations to misappropriate or fraudulently abstract it. It was easier after that event to embezzle the property than before, although it appears that the plaintiff had previously ample opportunity for converting the property. It was his duty to keep it safely for the benefit of those to whom it belonged. He performed his duty honestly and faithfully, and is entitled to credit for it, and the meed of praise is especially due to him for performing his duty under circumstances of temptation. It would have been very appropriate as a suitable recognition of his integrity, if those interested in this large estate had presented him a generous and very liberal gratuity, but we are confined to a consideration of his legal rights, and it cannot be adjudged upon the facts appearing in this case, that he has a legal cause of action, beyond his salary as clerk, without establishing a dangerous precedent.

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The plaintiff was entitled to recover apparently for eight days salary, at sixty dollars a month, and for that reason the non suit was not strictly correct, but this claim was not made either at the trial, or in this court, and it would not benefit the plaintiff to grant a new trial to enable him to recover so small a sum, and the maxim *de minimis non curat lex*, may be applied.

The judgment should be affirmed.

All concur.

Judgment affirmed.

JAMES R. THOMPSON, Respondent, v. FREDERICK O. BURHANS et al., Executors, etc., Appellants.

A person, claiming land under a defective conveyance, having entered into actual possession of a part claiming the whole, may have constructive possession of the residue.

This is so, however, only when the part not actually possessed is for use with, or subservient to, that so possessed ; it must have some necessary connection therewith.

In an action of ejectment plaintiff claimed under a void deed from the State comptroller, executed in 1836, purporting to convey, with other lands, the north-west quarter of a certain township containing 6,300 acres. Defendant unlawfully entered into possession of 2,000 acres of the north part of the said quarter. Plaintiff gave evidence to the following effect. He had paid the taxes on the land claiming title thereto, and caused the same to be surveyed. About 1852 he caused some lots to be surveyed in the north-west corner of said quarter, lot one containing 950 acres. In 1856 one R., under an arrangement with plaintiff, cut from this lot a quantity of logs, paying plaintiff therefor. In 1864 plaintiff hearing that defendants intended to enter upon the land, arranged with R. to go upon it, cut some logs, and build a shanty for the purpose of thus gaining possession. R. that winter went upon said lot one, cut logs and built a shanty without a roof, cutting over less than a quarter of an acre, and remaining thereon about three weeks ; in the summer of 1865 R. put a roof on the shanty, and built a barn. In the winter of 1865-1866 after the commencement of the action R. went upon the said lot under plaintiff, cut roads and cut a large quantity of logs. *Held*, that plaintiff did not show such possession as enti-

79	98
132	84
79	98
139	445
79	93
143	527
79	98
157	588

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tled him to recover for anything more, at most, than the small piece of cleared land upon which was the shanty and barn.

Jackson v. Lunn (3 John. Cas., 109), distinguished.

Woods v. Banks (14 N. H., 101), disapproved.

Thompson v. Burhans (15 Hun, 580), reversed.

(Argued November 12, 1879; decided December 2, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 15 Hun, 580; reported on former appeal, 61 N. Y., 52.)

The nature of the action and the facts appear in the opinion.

S. Brown, for appellants. In ejectment, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of defendant's. (Adams on Ejectment, 319; 2 Greenleaf's Ev., § 303; *Bloom v. Burdick*, 1 Hill, 130; 61 N. Y., 52.) If the acts of plaintiff can enure to his benefit in any respect, they certainly cannot to give him constructive possession of the whole of the north-west quarter of forty-seven. (61 N. Y., 68-69. *Monroe v. Merchant*, 28 id., 9.) The transactions testified to fall short of showing any right of recovery on the ground of prior possession. (*Miller v. L. I. R. R. Co.*, 71 N. Y., 380; *Lane v. Gould*, 10 Barb., 254; *Wheeler v. Spinola*, 54 N. Y., 377; *East Hampton v. Kirke*, 6 Hun, 257; *Miller v. Downing*, 54 id., 631; *Doolittle v. Tice*, 41 Barb., 181; *McFarland v. Kerr*, 10 Bosw., 249; *Jackson v. Harder*, 4 J. R., 202; *LaFrambois v. Jackson*, 8 Cow., 603; *Sharp v. Brandon*, 15 Wend., 597; *Jackson v. Schoonmaker*, 2 J. R., 234; *Monro v. Merchant*, 28 N. Y., 9; 61 id., 52.) The fact that the claimants of this land under the tax deed caused some surveying to be done upon this land, and paid some taxes thereon, does not help the plaintiff. Such acts have never been held to show a possession for any purpose. (61 N. Y., 70; 71

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id., 384-385.) Unless the claimant shows a regular chain of paper title from the source thereof, he must show an actual possession to lay any foundation for a right *prima facie* to recover. (*Gardner v. Hart*, 1 N. Y., 528.) Plaintiff is concluded by his admission from claiming he has had any prior possession of the premises. (1 Greenleaf's Ev., §§ 27, 186.) The patent to Lawrence only can be looked to for the purpose of ascertaining what it conveyed. The entire instrument should be construed, and every part of it, if possible, be made to take effect. (2 Blk. Com. [Wend. ed.], 397; *Webster v. Atkinson*, 4 N. H., 21; *Waugh v. Waugh*, 28 N. Y., 94; *Washington v. Hyler*, 4 Mass., 196; 6 Cow. R. [3d ed.], note, p. 721.)

A Pond, for respondent. Plaintiff was in the actual possession of the premises in question at the time the defendant entered upon them, and such possession was sufficient against a trespasser. (*Wood v. Banks*, 14 N. H., 102; 1 Hill on Real Prop. [4th ed.], 74, § 27; *Asher v. Whitlock* [Q. B.], 1 L. R., 1; *Miller v. Ball*, 64 N. Y., 292; *Johnson v. Elwood*, 53 id., 434; *Hopkins v. Mason*, 61 Barb., 469.) It having been established that the plaintiff had taken possession of the premises in question under his deeds before the entry of the defendants thereon, and that the claim of title of the defendants thereto was invalid as against the plaintiff, the latter is entitled to maintain this action of ejectment against the defendants to recover the possession. (*Jackson v. Hazen*, 2 J. R., 22; *Jackson v. Harder*, 4 id., 202; *Pierce v. Hall*, 41 Barb., 142; *Hill v. Draper*, 10 id., 455, 458; *Hopkins v. Mason*, 61 id., 469; *Jackson v. Dennis*, 5 Cow., 200; *Wood v. Banks*, 14 N. H., 102; 1 Hill on Real Prop. [4th ed.], 74, § 27; 61 N. Y., 68.) The Code, under which this action was brought, allowed a "person" to be made a defendant who has or claims an interest adverse to the plaintiff. (Old Code, § 118.) This section applies to the action of ejectment. (*Becker v. Howard*, 47 How., 423; *Fosgate v. Her. Man. Co.*, 2 Kern.,

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580, 583; *Abbeel v. Van Gelder*, 36 N. Y., 513, 514; *Lucas v. Johnson*, 8 Barb., 244; *Carter v. Hunter*, 40 id., 89, 93.)

EARL, J. This was an action of ejectment brought to recover an undivided five-sixteenth part of 4,000 acres of land described in the complaint as situated in the town of Newcomb, Essex county, in township number forty-seven, in Totten & Crossfield's purchase. The only title claimed by the plaintiff is under a tax deed from the comptroller of the State executed in 1836. It was held by the Commission of Appeals, upon a prior appeal in this case (61 N. Y., 52), that that title was, on account of certain defects in the proceedings prior to the execution of the deed by the comptroller, invalid, and hence the plaintiff cannot recover upon the strength of any title to the land claimed.

The defendants claim the same land under a patent from the State of a gore of land lying between Totten & Crossfield's purchase and McComb's purchase. The claim of the plaintiff is that the south line of McComb's purchase is the north line of Totten & Crossfield's purchase, and that there is no gore there. The claim of the defendant is that there is a gore there, and that the land claimed is in such gore north of township forty-seven and between that and McComb's purchase.

The defendants claim no other title than the patent from the State, and their title depends entirely upon the existence of the gore. Most of the evidence at the trial was directed to the question of the gore, and after a studious effort to comprehend the full force of the evidence given, I am of opinion that it presented a question of fact for the determination of the court at Special Term, and that its finding, like that of the referee, upon substantially the same evidence upon the former trial against the existence of the gore, is conclusive upon us.

We have, therefore, to deal with a case where neither party has any title to the land in controversy. The complaint alleges that the defendants are in possession of the

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lands, and that they withhold the possession from the plaintiff; and the defendants in their answer admit that they are in possession, but claim that the land thus possessed, instead of being in township forty-seven is in the gore north of the township. For the purposes of this action, therefore, it must be taken as a fact that the defendants were at and prior to the commencement of this action in the possession of the land claimed. The plaintiff, therefore, in order to succeed in his action and deprive the defendants of their possession, having no title to the land, must show a prior possession of the land which was wrongfully invaded by the defendants. Prior possession is sufficient to sustain a recovery in ejectment against a person who intrudes upon that possession without any right.

The comptroller's tax deed in form conveyed the north-west, the north-east, and the south-east quarters of the township, each quarter containing 6,300 acres of land. The lands claimed are 4,000 acres across the northerly ends of the north-west and north-east quarters. Upon the other trial it did not appear that the plaintiff had ever been in the actual possession of either of those two quarters; but it was admitted at that trial "that the north half of township forty-seven is wild and in a state of nature and covered with timber, and was never any of it cleared up or cultivated." So far as the plaintiff sought, upon the prior appeal, to sustain his recovery upon prior possession, it was upon a possession of a small portion of the south-east quarter, and for reasons stated in the opinions pronounced in the Commission of Appeals, that possession was held insufficient. It was not then held, as has been erroneously supposed, that that possession was sufficient to give constructive possession of the whole of the south-east quarter. It was simply held that it was not sufficient, with the deeds under which plaintiff claimed, to give constructive possession of the land in controversy.

Upon the last trial, besides the proof of payment of taxes, claim of title and surveys given upon the former trial, the plaintiff gave further proof of acts done upon the north-west quarter

of the township, as follows : In 1852 or 1853, the plaintiff caused some lots to be surveyed in the north-west corner of the north-west quarter of the township. The first lot on the westerly side of the quarter, as thus surveyed, contained 940 acres. In 1858, one Ralph, by arrangement with the plaintiff, cut from this lot from 500 to 1,000 pine logs and paid him for them. Nothing more was done upon the lot until December, 1864. Then the plaintiff, hearing that the defendants meant to enter upon the land under their claim, made an arrangement with Ralph, whereby he was to go upon the land and cut some logs there and build a shanty, for the purpose of thus gaining possession of the land. The avowed intention of the plaintiff was to have just enough done to get the possession. That winter accordingly Ralph went upon that portion of the north-west quarter called lot number one and cut logs for a shanty, and constructed one without any roof. He cut over less than a quarter of an acre that winter, and was there in all not over three or four weeks. During the summer of 1865, a roof was put upon the shanty by Ralph and a barn was built. This was all that was done upon the lot, as I understand the evidence, before the commencement of the suit. After the suit was commenced in the winter of 1865-1866, Ralph again went upon the lot under the plaintiff, and cut out some roads and cut between 3,000 and 4,000 logs.

Upon these acts of possession the court at Special Term gave plaintiff judgment for five-sixteenths of 2,000 acres, being so much of the land claimed as was in the north-west quarter of the township. The land thus recovered is a strip across that quarter, nearly one mile wide and nearly three and one-half miles long. The main question now to be determined is whether the plaintiff showed such possession as entitled him to this recovery. I think he did not.

That there was any actual possession of the land recovered cannot be well claimed. It was not inclosed. No part of it had ever been cultivated or improved. Whatever was done upon it was to take value from it, not to put value into it. It does not even appear that any one ever lived in the

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shanty, and no one representing the plaintiff was upon the land at the time of the alleged entry of the defendants or for some months before. Payment of taxes, surveying and assertion of right, do not constitute possession. They merely show a claim of title, and whenever it is important to show that, they are material. Going upon land from time to time and cutting logs thereon, does not give possession. Such acts are merely trespasses upon the land against the true owner, whoever he may be. Any other intruder may commit similar trespasses, without liability to any other trespasser. Such acts do not constitute a disseizin of the true owner. One may gain actual possession of land by fencing it, or by cultivating and improving it or by building upon it; and then he will have possession of as much as he has fenced, or cultivated and improved, or built upon with some land around and necessary for the buildings. Actual possession, — *possessio pedis* — can mean no more. So in the early stages of society, before there was any exclusive appropriation of lands, the shepherd had the possession of the lands upon which he was feeding his flocks, and the farmer of the lands which he inclosed or tilled. But it was never supposed that the hunter had possession of the forest through which he roamed in pursuit of game; and no more can a wood-chopper be said to possess the woods into which he enters to cut logs. The logs which he cuts are his against a mere intruder; and he may enter as against such one and remove them. But he has no standing which will prevent others from performing the same acts. The plaintiff, at most had actual possession of the shanty and the barn and the land cleared about them for use with them.

Nor did the plaintiff have any constructive possession of the land. Constructive possession is based upon a written title, which may be valid or invalid. The person having the valid title is always in law in the constructive possession of the land, unless he has become disseized. But a person claiming land under a defective conveyance must have actual possession of part of the land, and that gives constructive

possession of other land contained in the conveyance. In other words, he must have a written conveyance of land, and he must enter into actual possession of a part thereof, claiming the whole, and then he may, under certain circumstances, have constructive possession of the whole. Constructive possession arises in no other way than this. But the definition I have given is not yet complete. The part not actually possessed must be for use with or subservient to that actually possessed, and have some necessary connection therewith. One may purchase and take a conveyance of land for a farm and have actual possession of but a small part thereof, and the balance, uninclosed, may be kept for future improvement, and for fire-wood and fencing and building timber, and he will have constructive possession of such uninclosed land. But such constructive possession will extend only to such land as is used in connection with the improved land actually possessed, and to only so much as is reasonable and proper for that purpose, according to the custom of the country. If these defendants had built upon these lands a saw-mill and used the balance of them suitable in quantity to supply it with logs, or if they had opened a mine upon them and used the timber upon the balance for fire-wood in smelting and separating the ore, or if these lands had been suitable for pasturage, and the defendants had built a house and barns upon them and used them for herding large droves of cattle, like the ranchmen of Texas, California and some other States, there would have been room for the application of the doctrine of constructive possession. This doctrine is quite fully discussed in the opinions delivered upon the prior appeal in this case and in the more recent case of *Miller v. Long Island R. R. Co.* (71 N. Y., 380), and needs no further elaboration now. (See also *Wheeler v. Spinola*, 54 N. Y., 377; *Miller v. Downing*, id., 631.) Here there was no attempt or intent to improve any portion of the land claimed. No part of it was inclosed or possessed for the purposes of a farm. The shanty and barn seem not to have been erected for perma-

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nent use, and this large tract of land was not intended for use as one farm or in any way in subserviency with that actually possessed. Hence, within any authority that can be found in this State, there was no constructive possession of any part of this land.

The case mainly relied upon by plaintiff's counsel is that of *Jackson v. Lunn* (3 Johns. Cas., 109). But that case is not an authority upon the question involved here. That case determined what acts of ownership and possession of lands would furnish presumptive evidence of title sufficient to maintain an action of ejectment. But it did not deal with the case of one who confessedly had no title, but relied in an action of ejectment solely upon prior possession. In *Woods v. Banks* (14 N. H., 101), it was held that an entry upon a lot, with a view of taking possession of it under a claim of title and marking the lines of it by spotting the trees around it, is a sufficient possession of it against one who can show no right to enter upon the land, to sustain an action of trover for timber cut and taken from the lot. It is sufficient to say of that case that it is sustained by neither principle nor any authority to be found in this State. Can one mark the trees around one thousand or fifty thousand acres of forest land and thus gain a possession which will shut out all the rest of the world but the true owner? If the land were derelict, without an owner, according to the philosophic writers on the origin of society and of property, such acts would not give such possession as would exclude others. Passing around land or over it, asserting title ever so loudly does not give possession.

The evidence, therefore, warranted a recovery by the plaintiff at most of nothing but the small quantity of land occupied by the barn and shanty and the cleared land about them.

Our attention has been called to many exceptions to the rulings of the learned judge at Special Term upon questions of evidence. Those exceptions were before the Commission of Appeals, and it was not deemed important to consider them

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at that time; and we do not deem it important now to consider them, as their final determination may never be necessary.

The judgment must be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

79	102
136	105
79	102
147	597
79	102
152	298

ADDISON STEARNS, as Executor, etc., Respondent, v.
LORENZO D. GAGE, Impleaded, etc., Appellant.

A purchaser, for a valuable consideration, is not chargeable with constructive notice that the conveyance to him was made by his vendor with intent to defraud creditors; actual notice is required to impair or affect his title. (2 R. S., 137, § 5)

M., being insolvent, conveyed to his son F., who was then a man of no means, his farm, which was worth from \$10,000 to \$11,000. F. was then twenty-six or twenty-seven years old; after he became of age he continued working on the farm under no express agreement, except for a year previous to the conveyance, when he worked it on shares. The farm was conveyed subject to a mortgage of \$4,000. F., to secure a portion of the purchase money, gave back a mortgage of \$3,500, and \$1,500 was agreed upon and allowed for the services of F., after he became of age, and for his share of the proceeds of the farm for the last year which M. had received. F. also gave to M. a note for \$500, and executed a written agreement, by which, for an expressed consideration of love and affection and of \$100, he agreed to support M., and to pay him \$500 on demand, in case he should think it the duty of F. so to do. By another writing, executed about six weeks thereafter, M. conveyed to F. all his farming utensils and farm property in consideration of \$1,200, for which F. gave his notes. In an action by judgment creditors of M. to set aside the deed as fraudulent, *held*, that the facts authorized a finding that in and by the transaction the parties intended to hinder, delay and defraud the creditors of M.; and so, that the deed was void. F. subsequently conveyed the farm to L., his uncle, for \$12,000, which the grantee paid. There was no proof of actual knowledge on the part of L. of the fraudulent intent in the first transaction. The referee found that L. knew M. was embarrassed, but supposed him good at the time of his conveyance; that L. knew of the agreement for the support of M.; that before the conveyance to himself he, as administrator of M., took an inventory of his personal estate, and from the claims presented, knew that M. was insolvent at the time he conveyed; also, that he

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knew of the pecuniary circumstances of F. at that time. L. testified that he understood F. paid \$10,000, besides the agreement to support his father; that he had no design to hinder, delay or defraud, and did not know and had not been informed at the time he purchased that M. had any such design when he conveyed. *Held*, that the facts were insufficient to charge L. with constructive notice of the fraudulent intent on the part of M.; also that constructive notice was insufficient, actual notice was required to affect or impair the title of L.

(Argued November 13, 1879; decided December 2, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts appear sufficiently in the opinion.

H. L. Comstock, for appellant. Defendant being a purchaser for a valuable consideration was not chargeable with knowledge of his vendor's fraudulent intent, unless he had actual notice. (2 R. S., 137, § 5; *Birdsall v. Russell*, 29 N. Y., 220, 250; *Baker v. Bliss*, 39 id., 74.)

Wm. H. Smith, for respondent. Defendant had sufficient notice to excite his attention, and whether he had actual notice or not, he had notice sufficient to put him upon inquiry, and was not a *bona fide* purchaser. (Kerr on Fraud and Mistake [Am. ed. by Bump], 236, 237, 238; *Williamson v. Brown*, 15 N. Y., 354; *Baker v. Bliss*, 39 id., 70.) It is no answer that he paid full value for the land. (*Fullerton v. Viall*, 42 How., 294.)

MILLER, J. The plaintiff brings this action mainly for the purpose of vacating two conveyances of real estate, upon the ground that they were fraudulent as against creditors. The first conveyance was made by one Marvin Gage to his son, Franklin B. Gage, on the 1st day of April, 1871. The farm was subject to a mortgage of \$4,000. A mortgage was

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given for \$3,500 to secure a portion of the consideration money and the sum of \$1,500, which it was then agreed was due from the father to the son, was allowed for work and labor performed by the son for the father after the son became twenty-one years of age, and for the share of the son for working the farm the preceding year, which the father had received. The son also made a note to his father for the sum of \$500, payable in six months, and at the same time entered into an agreement in writing by which, in consideration of love and affection and of \$100, he agreed to support his father as provided and to pay him the sum of \$500 on demand if the father thought it his duty to do so.

By another writing, executed on the fifteenth day of May following, the father transferred to the son his farming utensils and farm property, in consideration of \$1,200, for which three promissory notes were given by the son of \$400 each, payable on time. The son, since he became of age, had resided at home, rendering service on his father's farm under no express agreement, except for one year preceding the sale when he worked it on shares, until the time of the conveyance to him when he was about twenty-six or twenty-seven years of age. The fair value of the farm at this time the referee finds was from \$10,000 to \$11,000.

At the time of the conveyance by Marvin Gage to his son of the farm owned by him, he was largely in debt and insolvent. The son had no property or means save his claim against his father. Considering that a portion of the consideration was for the services of his son for an amount which was not specifically stated, and that a provision was made for the benefit of the father in the arrangement, there was sufficient to warrant the conclusion of the referee that in and by the transaction the parties intended to hinder, delay and defraud creditors, and that the deed was void against the plaintiff's demand for that reason.

A different question arises as to the deed executed by Franklin B. Gage to his uncle Lorenzo D. Gage. The grantee paid the sum of \$12,000 for the farm, which,

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as we have seen, was found by the referee, to have been of less value. Having thus paid a full consideration, and with that fact to rebut any presumption of a fraudulent intent of Lorenzo D. Gage, and with no evidence of knowledge of the latter of such intent between the father and the son, and no proof that the amount secured was misappropriated or not applied to the payment of the debts of Marvin Gage, it is not manifest upon what principle of law the deed to the defendant can be adjudged fraudulent and void.

The ground of liability as stated by the referee is that the facts found by him "were sufficient to put the said Lorenzo D. Gage, at the time he purchased and took the deed from said Franklin B. Gage, upon inquiry as to the real nature and intent of the transaction by which the said Franklin acquired the title from his father, and amount, in law, to a constructive notice of such transaction and the intent with which it was made by the parties thereto;" and as a conclusion of law, "that the facts hereinbefore found were sufficient to put the said Lorenzo D. Gage, at the time he purchased and took the deed from said Franklin B. Gage, upon inquiry," etc. These findings are based upon the supposed knowledge of the defendant, Lorenzo D. Gage, in the summer of 1871, of the affairs of his brother, and that he was embarrassed and pressed by his creditors, notwithstanding that he testified he did not know that his brother was embarrassed and that he supposed Marvin to be good, as the referee also found. They are also founded upon the knowledge of Lorenzo of the agreement of the son to support his father, and that as administrator of the father after his decease, he took an inventory of his personal estate, and from the claims presented he became aware that the father was insolvent and in failing circumstances at the time he conveyed the farm to his son, and that he knew of the pecuniary circumstances of the son at the time he received the deed.

The defendant, Lorenzo D. Gage, testified that he understood that Franklin had paid \$10,000 besides the agreement

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to support his father. He also knew that Franklin was allowed \$1,500 for his work and services after he became of age, and for his share of the profits of the farm for one year which is not shown to be an extravagant sum, and, as he swears, Franklin was always a thrifty, provident and industrious man of good habits. That he had no design to hinder, delay or defraud, and that he did not know, and had not been informed at the time of the purchase, that at the time of the conveyance to the son Marvin Gage had any design to defraud his creditors. We think the findings of the referee were not sufficient to warrant the conclusion arrived at. The purchase of the farm by Lorenzo D. Gage for more than its value is a strong and, I think, controlling fact against the finding of the referee; for it is hardly to be supposed, under such circumstances, that the defendant would have been likely to commit a fraud, and thus jeopard the validity of the conveyance to himself and render himself personally liable for the debts of his brother Marvin. His whole conduct during the transaction is in direct conflict with any such theory and tends strongly to establish that he acted in entire good faith and without any fraudulent purpose; and it is proved that he paid a larger value for the farm than it was actually worth because it adjoined his own farm and he desired to purchase it for his son. Considering the circumstances to which we have adverted, without any proof that the defendant reaped any pecuniary advantage by the purchase as against the creditors of Marvin Gage, or that any creditor suffered or was defrauded thereby, and with testimony establishing beyond controversy that the consideration was full and sufficient, we are not prepared to hold that he had constructive notice of any defect in the grantor's title and was chargeable with fraud.

The principles which govern and control the doctrine of constructive notice as to fraud are well defined and familiar. The rule is stated by SELDEN, J., in *Williamson v. Brown* (15 N. Y., 362), to be that when a purchaser has knowledge of any fact sufficient to put him on inquiry as to the exist-

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ence of some right or title in conflict with that he is about to purchase, he is presumed either to have made inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence fatal to the claim to be considered a *bona fide* purchaser. It is also held in *Baker v. Bliss* (39 N. Y., 70), that to charge a party with such notice, the circumstances known to him must be such as ought reasonably to have excited his suspicion and led him to inquire. In the case at bar it is not apparent that the purchaser was acquainted with any fact which might create a well grounded belief that there was any defect in the title of his grantor. There is evidence to show that he had reason to believe, and did suppose, that a full consideration had been paid for the farm, independent of the agreement to support the father of his grantor. He also knew that his grantor had worked for his father for a number of years, and had no occasion to question the validity of the claim allowed for his services. Under such evidence it cannot be claimed that any question as to constructive notice was presented upon the trial.

Be that, as it may, however, we think that this is not material, as actual notice is required where a valuable consideration has been paid. The statute relating to fraudulent conveyances (2 R. S., 137, § 5) provides that its provisions "shall not be construed, in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of fraud rendering void the title of such grantor." This plainly means that actual notice shall be given of the fraudulent intent or knowledge of circumstances which are equivalent to such notice. Circumstances to put the purchaser on inquiry where full value has been paid are not sufficient. If he knew of the fraud, that would be enough. It is not found that he had such knowledge in the case considered. As there is no such finding, we may assume that he had no knowledge of the fraud; and without this no case is established which would invalidate the conveyance to him and warrant the con-

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clusion of the referee. No authority has been cited which sustains the principle that a purchaser for a valuable consideration, without previous notice, is chargeable with constructive notice of the fraudulent intent of his grantor; and such a rule would carry the doctrine of constructive notice to an extent beyond any principle which has been sanctioned by the courts, and cannot be upheld.

It follows that the referee was wrong in his conclusion; and for this error the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur, except RAPALLO and EARL, JJ., not voting.

Judgment reversed.

THE FIRST NATIONAL BANK OF SPRINGFIELD, ILLINOIS,
Respondent, v. CHARLES A. DANA, Appellant.

While it is the province of the courts to construe contracts, yet where the meaning of a contract is obscure and depends upon facts *aliunde*, in connection with the written language, the question of construction may be one of fact for the jury.

In the absence of any motion or act, on the part of a defendant, upon the trial of an action from which an assent to a decision of the case by the court, and a waiver of the right to go to the jury may be implied, an exception to a direction of a verdict for plaintiff is sufficient to present the point on appeal that there were questions of fact for the jury; it is not necessary to request the submission of any such fact.

Defendant was the editor of a newspaper owned by a corporation, a portion of the stock of which he held. W., who was plaintiff's president, owning a majority of its stock, was also a stockholder in said corporation. Defendant was advised by the publisher of the paper, who had been to see W. and other stockholders, that they had concluded to levy an assessment upon the stock, and that they had agreed to furnish the money for his share upon pledge of his stock. It was represented to defendant that W. had paid his subscription to the stock in full, that there was to be an additional assessment upon all the stock, and that W. was to pay his share. The note in suit was thereupon made, and delivered to the publisher. W. had not paid his assessment, nor had he paid in full for his stock. At a subsequent meeting of the stockholders of the newspaper company, it was agreed that defendant should withdraw from it and give up his stock, the stockholders agreeing to assume payment of the note; and defendant thereupon surrendered his

79 108
118 301

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158 555
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stock. Upon being advised that a claim was made against him, defendant wrote to plaintiff, stating the facts, and that if sued he would be obliged to sue the company and its stockholders. Plaintiff's cashier thereafter wrote defendant, proposing that if defendant would sue the newspaper company for the performance of the contract to pay the note, it would pay one-half the cost, adding that if the proposition suits it will avoid the necessity of a suit upon the note. An agreement was entered into upon the basis of this letter. Defendant brought an action against said company, obtained judgment, and upon return of execution unsatisfied brought suit against the stockholders, which was pending when this action was commenced. The court directed a verdict for plaintiff; *held*, error; that if the letter of plaintiff's cashier stood alone, it was a question whether the contract was not satisfied by bringing the action and obtaining the judgment against the company; if all the letters were to be considered it was not clear that a suit against the stockholders was not a part of the arrangement; and that this was a question for the jury.

(Argued November 18, 1879; decided December 2, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict, and also affirming an order denying a motion to set aside the verdict and for a new trial.

This action was brought upon a promissory note made by the defendant, payable to the order of the plaintiff.

The answer admitted the making of the note, and set up by way of defense: That the defendant deposited with the plaintiff, as collateral security for the payment of the note, \$10,000 in stock certificates of the Chicago Republican Company, which collaterals were worth more than the amount of the note; that about May, 1866, the Chicago Republican Company agreed with the defendant, that it would pay this note, in consideration, among other things, of the transfer to that company by the defendant of all his interest in the aforesaid collaterals; that in or about 1870, the plaintiff, with knowledge of the aforesaid agreement, promised and agreed with the defendant that it would not sue him upon this promissory note, if he would sue the Chicago Republican Company thereon, for the plaintiff's benefit, and would institute legal proceedings against the

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individual stockholders of that company, if the same should prove necessary; and it was agreed that the plaintiff and defendant should pay one-half the expenses of the suits and legal proceedings thus contemplated; that pursuant to this last agreement, the defendant sued the Chicago Republican Company, and recovered judgment, which, however, could not be directly enforced, by reason of the dissolution of that corporation; he then sued the individual stockholders, in an action which is still pending; and he has paid all the expenses of these legal proceedings and fully performed the agreement on his part.

Plaintiff replied, admitting, "that in the month of July, 1869, the plaintiff being then the holder of the note for which this action is brought, did agree with the defendant, that in case he would in his own name bring action to enforce the payment of said note against the Chicago Republican Company, under an agreement given to said Dana by the said Chicago Republican Company to pay said note, or the amount thereof, that they would not proceed against him until judgment was recovered in said action, and would pay one-half of the costs of said suit when due, and that said suit was brought against said Chicago Republican Company, by said Dana, and that on the 9th day of January, 1871, and before the commencement of this action, a decree or judgment was entered therein in favor of said Dana against the Chicago Republican Company."

The facts appearing on trial are set forth sufficiently in the opinion.

Willard Bartlett, for appellant. The refusal of a trial court to direct a verdict or to nonsuit is not error, where although the evidence be uncontradictory, conflicting inferences may be drawn therefrom; or where conflicting constructions or meanings may be fairly given to the language employed. (*Smith, Exrx. v. Coe*, 55 N. Y., 678; *Thurber v. Harlem, etc., Co.*, 60 id., 326; *Heyne v. Blair*, 62 id., 19; *Lake v. Calhoun*, 52 Ala., 115; *Railroad Co. v. Stout*,

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17 Wall., 657.) If the intention of the parties to a verbal contract is doubtful, although there may be no conflict in the evidence, the jury must be allowed to determine what the contract was. (*Swanuer v. Swanuer*, 50 Ala., 66; *Delfinger v. Fishback*, 12 Bush. [Ky.], 474.) Questions as to the meaning of particular words used in a special sense in a written instrument are for the jury. It is not true that no question of construction can be submitted to a jury. (*Pitney v. Glens Falls Ins. Co.*, 65 N. Y., 17; *Marshall v. Dodson*, 1 Heisk., 95; *Etting v. Bk. of U. S.*, 11 Wheat., 59.) When the meaning of a contract is to be judged of, not alone by the intrinsic light of the writing, but by facts *aliunde* in connection with the written language, the case ought to be left to the jury upon the whole evidence. (*Gardner v. Clark*, 17 Barb., 538; *Gauson v. Madigan*, 15 Wis., 144; *School Dist. v. Lynch*, 34 Conn., 333; 1 Penn., 386.) The defendant can avail himself of the error of withdrawing the case from the jury and directing a verdict, without having himself requested the court to submit the questions of fact to the jury. (*Stone v. Flower*, 47 N. Y., 566; *Clemence v. City of Auburn*, 66 id., 334; *Trustees Easthampton v. Kirk*, 68 id., 459.) Plaintiff's cashier had sufficient authority to render it liable under the agreement with defendant. (*Brindenbecker v. Lowell*, 32 Barb., 17; *Olcott v. Tioga R. R. Co.*, 27 N. Y., 558; 12 Wheat., 64.)

Chas. C. Emott, for respondent. There was no question of fact, no issue to be submitted to the jury. (*Underhill v. Vandervoort*, 56 N. Y., 242; *Groat v. Gile*, 51 id., 441; *Bank v. Myles*, 73 id., 336, 341; *People v. Cook*, 8 id., 67-72; *Benson v. Southard*, 10 id., 236.) If there had been any possible question to submit to the jury, the defendant was bound to ask the court to have it submitted. (*Mallory v. Tioga R. R.*, 3 Abb. Ct. App. Dec., 139; *Dows v. Rush*, 38 Barb., 157-180; *Winchell v. Hicks*, 18 N. Y., 558, 565.)

MILLER, J. The judge upon the trial held that the plaintiff's reply to the defendant's answer admitted that they did

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agree that, in case the defendant would sue in his own name the Chicago Republican Company to enforce the payment of the note, that the plaintiff would not proceed against him until judgment was recovered in that action ; that this should be taken as the limit of liability ; and that there would be no other forbearance created in the proposition contained in the letter of the plaintiff's cashier to the defendant, upon a fair construction of its language. The case was disposed of upon the construction to be placed upon this letter regarding it as an agreement between the parties. Several requests were made to charge the jury, which were refused and exceptions severally taken to each refusal, and the judge directed a verdict in favor of the plaintiff, to which ruling an exception was also taken.

The principal question which presents itself is whether the judge erred in the withdrawal of the case from the jury, and in thus directing a verdict. The solution of this question involves a consideration of the evidence presented upon the trial. While the facts were undisputed, there were circumstances connected with the transaction which properly should be taken into consideration in determining the inferences to be drawn from the acts of the parties themselves.

The defendant was the editor of the Chicago Republican newspaper, which was owned by a corporation in which he had received stock as an inducement to become such editor. According to the defendant's testimony, the paper was out of money, and the publisher, who was the general manager and who had charge of its finances, went to Springfield to see General Williams, who was plaintiff's president, and Mr. Bunn, who carried on a private bank of his own, and who were stockholders and had established the paper, returned and told the defendant that they had concluded to levy an assessment upon the stock, and wanted him to pay his share ; and that they agreed to furnish the money, with a pledge of the stock. It was also represented to and understood by the defendant that Williams had paid his subscription to the stock in full ; that there was to be an additional assessment

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upon all the stock ; and that both Williams and Bunn had agreed to and were to pay their assessment. The note in suit was made payable at the plaintiff's bank, because Williams, as defendant testifies, was the bank. According to his (Williams') own testimony, he owned a majority of the stock. It was under these circumstances and by reason of these representations, that the note in question and another were delivered to the publisher to be sent to Springfield to raise the money.

The proof shows that Williams had neither paid his assessment nor had he fully paid for his stock ; and it is thus manifest, — if the defendant's version of the transaction is correct — that the notes were obtained from him under representations which were not true. It is also proved and not contradicted, that afterwards, at the time when the defendant's separation was agreed upon at a meeting of all the stockholders, — which, we may assume, included the plaintiff's president — that the defendant proposed to them that they should pay these notes, and, at the same time, pay him a large sum of money, and that the defendant should give them the stock, as a condition of his giving up the contract. They thereupon agreed to assume the payment of the two notes, and, in accordance with this arrangement, the stock was surrendered and the defendant was relieved from any obligation to pay such notes. He had a right to suppose — and there is evidence which sustains the theory — that he was then discharged from all obligation to pay the same, unless the note in question had been transferred to the plaintiff absolutely, without notice as to the facts, and it held the same as a *bona fide* holder, without any participation in the arrangement for its payment. In this respect there is no direct evidence. It does, however, appear that, upon the defendant's being advised that a claim was made against him for the same, a correspondence ensued, all or a portion of which was introduced in evidence upon the trial by the plaintiff, except the letter of the plaintiff's cashier, dated July 9, 1869. The first letter of the defendant, dated March 17, 1868, to the

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plaintiff's cashier, gives a history of the notes substantially as already stated, and says the Republican Company have settled one of them, and that they are bound to settle the one held by the plaintiff. The answer to this is not given, and on the twenty-fourth of March following the defendant again writes, and says he does not want to be sued for nothing, and if he is, he has "no recourse but to sue the Republican Company and its individual stockholders," and refers to Mr. Williams, the plaintiff's president, as one of them, and offers to write to him or others, as advised. On the eighth of October following the defendant again writes, stating that he has written to Bunn, Williams and other prominent stockholders, that he should have to sue them if the plaintiff sued him, as they were individually liable. On the ninth of October the defendant also writes to Gen. Williams that he has been notified by the plaintiff of the intention to sue him on the note, and states that if he is sued he will be compelled to bring a suit in the United States Circuit Court against the company and its stockholders.

There can be no mistake as to the construction to be placed upon these letters, and as to the fact that at this time the plaintiff was fully advised of the circumstances under which the note in question was given, and of the fact that an arrangement had been made by which they were to be paid by the Republican Company, nor as to the proposal or suggestion of the defendant to sue the company and the stockholders, and to pursue this remedy.

In the absence of any proof that any further correspondence ensued until the 8th of July, 1869. it is at least questionable whether the letter of the plaintiff's cashier of that date should be regarded as a response to the last letter of the defendant. This letter states the inability of the plaintiff to get Mr. Bunn or the Republican Company to settle, and proposes to save expense, and that if the defendant will sue the Republican Company for the performance of the contract in paying the note, they will divide the expense of the suit with him, or rather that they will pay

one-half of the costs of the suit. It also states that if the proposition suits, it will avoid the necessity of commencing a suit upon the note which will be more satisfactory all around. If the letter of the plaintiff's cashier stood alone, a question would arise whether the contract was not satisfied by the bringing of the suit and obtaining a judgment against the Republican Company; but if all the letters are to be taken into consideration, it is certainly not clear that a suit against the stockholders also was not a part of the arrangement. The defendant upon being informed of the claim, declined to pay and suggested a suit against the company and the stockholders. The cashier's letter, if it may be regarded as an answer, accepts the proposition to sue the company at least, without using language which expressly limits the suit to the company alone, or intimating in any manner that he refuses to accede to suing the stockholders. Such an answer might well be regarded, under some circumstances, as an acceptance of the entire suggestion to sue both the company and the stockholders. The object of the suit would be to collect the demand; and as defendant had named the stockholders as persons to be sued, it is hardly to be assumed that such a purpose would be effectually accomplished by a suit against the company only. If the letters are to be taken together, there was a contract to delay for some time; and it is not manifest that it was contemplated to stop with the company, when it was by no means certain that a judgment against it would be of any avail. The letter of the cashier, in view of the inferences to be drawn from all the facts, might, perhaps, be construed by a jury as an acceptance of the defendant's suggestion or proposal. Although the letter was written some time after the defendant's letters, the lapse of time after all left a question of fact for the jury to determine whether it was in response to the defendant's letters; and it was for the jury to decide, under the circumstances, whether there was not an entire acceptance of the full proposition of the defendant to sue both the company and the stockholders.

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While it is the province of the court to construe contracts, yet where the meaning is obscure and depends upon facts *aliunde* in connection with the written language, very much must be left to the jury. (Phil. on Ev. [Cow. & H's. notes], 1420; *Gardner v. Clark*, 17 Barb., 551; *Elting v. Bank of U. S.*, 11 Wheat., 59; *Jennings v. Sherwood*, 8 Conn., 122.) Within this rule the case should have been submitted to the jury by the judge; and it was error to direct a verdict for the plaintiff.

The plaintiff has no ground of complaint of the consequences resulting from the agreement if made, so long as it was entered into for a valid consideration and in reference to a claim which the defendant had reason to believe was actually paid. If the plaintiff did enter into a contract to allow the defendant to collect the debt of the parties who justly should pay it, no lawful reason exists why it is not obligatory.

It is claimed that the defendant was bound to ask the court to submit the question to the jury. We think that this was not necessary. The cases which hold that this is required are those where the party had, by motion for a non-suit, or by resting their defense upon certain propositions of law, or by requesting the court to direct a verdict, impliedly waived their right to go to the jury. (See *Winchell v. Hicks*, 18 N. Y., 558; *O'Neill v. James*, 43 id., 84.) This was not such a case, as no motion was made by the defendant's counsel which assented to a decision of the case by the judge, and several requests were made to charge the jury, which were refused. It was not treated at all by the defendant as involving a question of law merely, and comes directly within the rule laid down in *The Trustees, etc., of East Hampton v. Kirk* (68 N. Y., 459), that where the court directs a verdict, an exception to the ruling of the judge, in the absence of anything from which it may be implied that the right to go to the jury had been waived, is sufficient to present the objection upon appeal that there were questions of fact for the jury, and that it is not necessary to request that every fact

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be so submitted. This case is decisive. No other points or suggestions are made in support of the judgment which demand comment; and the judgment and order must be reversed and a new trial granted, with costs to abide the event.

All concur, except ANDREWS and EARL, JJ., dissenting.

Judgment reversed.

WILLIAM H. HUME, Appellant, v. JOHN B. HENDRICKSON,
Executor, etc., Respondent.

Plaintiff and J. (to whose rights plaintiff subsequently succeeded) leased of R. certain premises for twenty-one years, from May 1, 1855. R. covenanted that if the lessees erected a building, as specified, upon the demised premises, he would advance \$20,000, to be secured by the lessees' bond, and a mortgage upon the leasehold interest; and at the termination of the lease he would, at his option, either pay the appraised value of the building or execute a new lease for a further term. The building was erected, and the money loaned and secured as covenanted. In May, 1858, the lessors executed to C., defendant's testator, a sub-lease of the premises for seventeen years and six months, from August 1, 1858. C. covenanted "to assume, pay off, and discharge" said mortgage. In August, 1858, said lessees executed to C. another instrument, by which they agreed, upon his compliance with the covenants in said sub-lease, at the expiration of the term therein specified, "at and upon the application" of C., or assigns, to grant a renewal for the further term of eighty-five days, and to execute an assignment of the right of said lessees to a renewal of the original lease, or to a payment of the moneys awarded to them for the value of the buildings and improvements. C. assigned the sub-lease and agreement; the holder thereof made no application for a renewal, as authorized by the agreement; but on the contrary gave written notice that he would not avail himself of such right; and at the expiration of the term specified in the sub-lease surrendered the premises. Plaintiff paid the mortgage, received from the lessors an agreed price for the improvements, and took a new lease. In an action on the covenant of C. to pay the mortgage, *held*, that plaintiff was entitled to recover; that under said covenant a cause of action arose upon failure of C. to pay the mortgage when it became due and payable; that conceding the sub-lease and subsequent agreement were to be taken and construed together, the covenant of C. in the former was not modified or affected by the latter; also, that, as neither C. nor his assigns availed themselves of the privileges of renewal, all their rights termi-

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nated at the expiration of the term specified in the sub-lease, the original lessees were at liberty to deal with the property as they chose, and their subsequent action furnished no defense.

(Argued November 19, 1879; decided December 2, 1879.)

APPEAL from order of the General Term of the Court of Common Pleas, in and for the city and county of New York, reversing a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought upon a covenant on the part of Albert Clark, defendant's testator, hereinafter stated.

The referee found, substantially, the following facts :

On or about the 1st day of May, 1855, one William C. Rhineland and Mary, his wife, executed to James Hume and William H. Hume, a lease of certain premises in the city of New York for the term of twenty-one years from May 1, 1855, at and for the annual rent of \$4,000. The lessees agreed to erect a building upon the demised premises as specified, costing at least \$25,000, within one year after the commencement of the term. The lessors covenanted that if the building was so erected they would at the expiration of the term, at their option, either pay for the building and improvements, or execute a new lease for a further term of twenty-one years, the rent for the new term and the value of the improvements to be fixed by appraisers. By agreement of the same date, said Rhineland agreed with the Humes that, upon the completion of a building upon the lot demised as covenanted, he would advance to them \$20,000, secured by their bond and a mortgage upon the said lease and the said building. The lessees having erected the said building executed to Rhineland their bond of \$20,000, payable on the 4th day of December, 1862, with interest, secured by their mortgage, upon their interest in the premises demised.

The said lessees, by indenture dated to May 1, 1858, demised to said Albert Clark the said premises for the term of seventeen years and six months, from the 1st day of August, 1858; *i. e.*, until the 1st day of February, 1876, the said Clark,

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covenanting to pay the Humes the yearly rent of \$4,000, to keep and perform the covenants made by the Humes, in their lease from Rhineland, and to assume, pay off and discharge the said mortgage of \$20,000, with interest thereon, from the 1st day of May, 1858. By an agreement between the Humes and said Clark, dated the 2d August, 1858, after reciting the foregoing lease, in consideration thereof, and for other good and sufficient considerations, the Humes agreed with Clark that, upon his faithfully complying with all the covenants and agreements of said lease, at and upon the expiration of the term of said lease, they would "at and upon the application of the said Clark, his executors, administrators or assigns," grant a renewal of said lease, upon the same conditions, etc., for the further term of eighty-five days, and would also execute and deliver to him an assignment of all their equitable interests, under and by virtue of the covenants contained in the lease to them, for the renewal of said lease, and would authorize and empower the said Clark, his executors, administrators or assigns to receive to and for his or their use all moneys that might be awarded and become payable to them, the said Humes, under and by virtue of the said lease, for the value of the buildings and improvements upon the demised premises. On or about the 1st of February, 1860, Clark assigned to the Excelsior Fire Insurance Company the lease to him from the Humes, and also the agreement of August 2, 1858, subject to the covenants and conditions therein contained, which the said Excelsior Fire Insurance Company undertook and agreed to perform, except so far as said covenants had been performed or released. On or about the 28th of February, 1872, Marcus F. Hodges, as receiver of the said insurance company, assigned to one Monmouth B. Wilson, and on or about the 22d March, 1872, said Wilson assigned to Walter H. Lewis said lease and agreement by assignments containing, substantially, the same provision as the assignment from Clark to the Excelsior Fire Insurance Company. The sum secured by the bond and mortgage from Rhineland was

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not paid by Clark, or by any of those who succeeded to his leasehold interest; and on the 24th of December, 1875, foreclosure proceedings were instituted by said Rhinelanders against the Humes and others to foreclose the mortgaged premises, and to hold the Humes liable on their bond in case of deficiency upon the sale. Upon the 20th of January, 1876, Walter H. Lewis gave written notice to the Humes that he would not avail himself of the renewal rights reserved in the agreement between the Humes and Clark of August 2, 1858, and surrendered possession to the Humes of the premises on the first of February following. Proceedings were thereupon taken in February, 1876, in accordance with the provisions of the original lease from Rhinelanders to the Humes, for a valuation of the buildings on the demised lot, and to determine at what rent a new lease should be granted. The arbitrators made their award on the 26th of February, 1876, valuing the building at \$25,000, and determining the rent for the new lease to be given in accordance with the terms of the first lease at \$5,000. On the 2d March, 1876, Rhinelanders, by notice to the Humes, made his election in conformity to the provision of the original lease to grant a renewal. On the 14th April, 1876, plaintiff and Alexander W. Hume, who had acquired all the interest of James Hume under the original lease, in consideration of the sum of \$20,000, sold all their right, title and interest in and to the building to Rhinelanders, who thereupon executed to them a lease for the term of twenty-one years at the annual rent of \$6,400. On the same day and at the same time the bond and mortgage, with the interest thereon and the costs of foreclosure, were paid by plaintiff. On the 16th of May, 1876, James Hume assigned to the plaintiff all his interest in all claims arising out of the covenants of Albert Clark.

Upon these facts, the referee found, as matter of law, that defendants' testator never acquired any right or title to the building which was upon the demised premises at the time of the lease to him, and that his estate was liable for his failure to pay off and discharge the bond and mortgage assumed

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by him in said lease, and directed judgment for the amount thereof. Judgment was entered accordingly.

Edmund Randolph Robinson, for appellant. A cause of action against defendant's testator for breach of the covenant contained in the sub-lease to him accrued in favor of plaintiff and James Hume on December 4, 1862, when the mortgage debt became due and Clark failed to pay off and discharge it. (*Post v. Jackson*, 17 J. R., 239; affirmed in Court of Errors, *Jackson v. Post*, 17 id., 479; *Thomas v. Allen*, 1 Hill, 145; *Cady v. Allen*, 22 Barb., 388; *Gilbert v. Wyman*, 1 N. Y., 550; *Tyler v. Ives*, id., 554; *Rector, etc., Trinity Ch. v. Higgins*, 48 id., 532; *Belloni v. Freeborn*, 63 id., 383; *Martin v. Court*, 2 Term R., 640; *Toussant v. Martinnaut*, 2 id., 100; *Hodgson v. Bell*, 7 id., 97.) Plaintiff and James Hume were under no obligation to make a transfer until defendant's testator had offered to assume the obligations, as well as to receive the benefits of their reversionary interest. (1 *Parsons on Cont.* [6th ed.], 538; *Bruce v. Tilson*, 25 N. Y., 197; *M'Nit v. Clark*, 7 J. R., 465; *Kerr v. Purdy*, 51 N. Y., 629; *Maxwell v. Ward*, 13 Price, 674; *Allen v. Hilton*, 1 Foul. Eq., 432; *Rubery v. Jarvise*, 1 Term R., 229; *Maxwell v. Ward*, 13 Price, 674; *Eaton v. Lyon*, 3 Ves. Jr., 690; *City of London v. Mitford*, 14 id., 41; *Harries v. Bryant*, 4 Russell, 89; *Bayley v. Corporation*, 3 B. C. C., 529; *McCracken v. Finley*, Sneed [Ky.], 195; *Adams' Eq.* [Am. ed.], 88, 89; *B'klyn R. Co. v. Brown*, 38 How. Pr., 444.) Defendant's testator has had the whole consideration for his covenant, and cannot refuse to discharge it on the ground that any part of the consideration remains unperformed. But if he had only received a part, it is no bar to an action on his covenant that another part of the consideration has not been performed. (*Parsons on Cont.* [6th ed.], 527-533, notes Q and R, also pp. 676, 677; *Boone v. Eyre*, 1 H. Bl., 273; *McCullough v. Cox*, 6 Barb., 386; *Betts v. Perine*, 14 Wend., 219; *Tompkins v. Elliott*,

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5 id., 496.) The covenant to pay the mortgage was not concurrent with or dependent upon the covenant to assign the reversion, and never became concurrent with or dependent upon such covenant, but was an independent undertaking. (*Smith v. Betts*, 16 How. Pr., 251; *Dox v. Dey*, 3 Wend., 356; *Dey v. Dox*, 9 id., 129, 133.)

William P. Chambers, for respondent. Covenants should be construed according to the meaning of the parties and the good sense of the case. (2 Parsons on Cont. [6th ed.], 676; *Ritchie v. Atkinson*, 10 East, 295; *Glaholm v. Hays*, 2 M. & G., 266; *Barruso v. Madan*, 2 J. R., 148; *Smith v. Woodhouse*, 2 B. & P., 240; *Morton v. Lamb*, 7 Term R., 130; *Glazebrook v. Woodrow*, 8 id., 371; *Wright v. Smith*, 4 Watts & Serg., 533; *Tompkins v. Elliott*, 5 Wend., 496.) The time of payment of the mortgage was not of the essence of the contract, because it had not been made so. (*Hubbell v. Von Schoening*, 49 N. Y., 326.) Where one party is to do a thing on, or upon, or when another party does another thing, the former cannot compel the latter to perform without tendering an offer of performance on his part. (*Adams v. Williams*, 2 W. & S., 227; *Divine v. Divine*, 58 Barb., 264; *Dunham v. Mason*, 4 Seld., 508; *Culver v. Burgher*, 21 Barb., 234.) The covenant of Clark to pay the mortgage which, before February 1, 1876, might have been enforced as a condition precedent, at that date became, by lapse of time, a covenant concurrent or dependent so far that the Humes could not enforce it without averring readiness or offer to perform on their part. (*Gillum v. Dennis*, 4 Ind., 417; *Irwin v. Lee*, 34 id., 319; *Beecher v. Conradt*, 13 N. Y., 108.) It does not necessarily render a covenant independent that it goes only to a part of the consideration. (*Grant v. Johnson*, 5 N. Y., 247.) Under the lease to Clark, and the agreement of second of August, Clark acquired an equitable interest in the renewal for the eighty-five days, and also in the "equitable interests" which the Humes had under the Rhinelander lease

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in the covenant of the Rhinelanders, for a new twenty-one year lease or for payment for the building. (*Champion v. Brown*, 6 J. Chy., 402; *Hathaway v. Paine*, 34 N. Y., 103; Sugden on Vend. [8th Am. ed.], 175.) A right to a specific performance is available as an equitable defense in this action. (Story's Eq. Jur., § 76; *Laird v. Smith*, 44 N. Y., 619; *Duffy v. O'Donovan*, 46 id., 227; *Hubbell v. Von Shoe-ning*, 49 id., 330, 331; *Giles v. Austin*, 62 N. Y., 486; Fry on Spec. Perf. [2d Am. ed.], 412; Willard's Eq. [Potter's ed.], 295; *Waters v. Travis*, 9 J. R., 465; *Allerton v. Johnson*, 3 Sandf. Chy., 72; *Dobson v. Pearce*, 12 N. Y., 166; *Fost v. Sprague*, 12 How., 358; *N. Y. C. Ins. Co. v. Nat. P. Ins. Co.*, 4 Kern., 90; *Vassar v. Livingston*, 13 N. Y., 248; Voorhie's Code, § 150; Story's Eq. Jur., § 1521.) Only damages for the actual injury sustained could be recovered. (Sedg. on Dam. [4th ed.], 235, 259, 430; 2 Pars. on Con. [3d. ed.], 432.) Plaintiff was chargeable with the benefits accruing to him as against his claim for damages. (*Laraway v. Perkins*, 10 N. Y., 371; *Baker v. Connell*, 1 Daly, 469; *Harris v. Bernard*, 4 E. D. Smith, 195; *Levenworth v. Packer*, 52 Barb., 132; *Vassar v. Livingston*, 3 Kern., 256; 2 Duer, 642; 6 Bosw., 458; *Henning v. Punnett*, 4 Daly, 545; *Taylor v. Read*, 4 Paige, 561.)

DANFORTH, J. The defendant claims that the lease from William and James Hume to Clark, dated May 1, 1858, and the agreement between these parties, dated August 2, 1858, are *in pari materia* and should be construed together. It is in this aspect that the defendant's case is the strongest, and while we are not satisfied that it could be sustained upon the evidence or by any just inference from the contents of the papers, we shall, in our examination of the question presented on this appeal, regard the claim as established. At the time of the execution of those instruments, James and William H. Hume were liable upon their bond to Rhineland, dated December 4, 1855, in the sum of \$20,000, payable December 4, 1862, and the premises in question

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were mortgaged to secure its payment. Under the lease of May 1, 1858, from James and William H. Hume, Clark acquired the right to the use of the mortgaged premises for the term of seventeen years and six months from the 1st of August, 1858, "paying therefor the yearly rent of \$4,000," and subject to the provisions of a lease executed by the Humes to Roder and others (the terms of which do not appear), and subject, also, to all the provisions, covenants and conditions contained in the lease of the premises, bearing date May 1, 1855, executed by Rhineland and wife to the Humes, and as to the performance of the stipulations and covenants in these two instruments, Clark was to stand in their place. It is also provided therein that the lease is subject to the mortgage above referred to, and Clark covenants and agrees to pay off and discharge the same with interest from the 1st day of May, 1858. The lease contains these covenants and is signed by Clark. We have, therefore, an express and formal covenant on his part for the payment of the mortgage, and it was apparently as much the inducement or consideration for the letting by the Messrs. Hume as was his promise to pay the annual rent. No provision is made for its re-payment or any contingency suggested upon the happening of which he shall be relieved. His position in regard to it is in no sense different, so far as the instrument of May first is concerned than it would have been if he had paid the sum of \$20,000 in cash at the time of its execution as a bonus or premium for the lease. As it was, he became bound at that moment to discharge the mortgage; the interest as it accrued from time to time and the principal sum when the mortgage came to maturity; and there is not, in the instrument by which this obligation was assumed, any provision for the return to him of any benefit of any kind, save in the enjoyment of the premises. Nor do we understand that the learned counsel for the respondent or the learned court whose judgment is under review, claim otherwise; but the judgment and contention here, in its support is put upon the ground that the agreement of August 2, 1858, warrants and requires

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a very different construction. So far as the question in hand is concerned, we discover no such necessity, nor do we find in it any term or provision material to the case and affecting the point in dispute. The conclusion reached upon the lease of May first is that the obligation on the part of Clark in respect to the mortgage was absolute and unconditional. It does not seem to have been modified by the agreement of the second of August. Under that instrument he would, at the expiration of the term granted in May, be entitled to a renewal of the lease at the same rate of rent for the further term of eighty-five days, and an assignment of all the equitable interests of the Messrs. Hume under the covenants contained in the lease from Rhineland to them of May 1, 1855, for a renewal of said lease from Rhineland, and an authority or power to receive to his own use all moneys that might be awarded and become payable to the Messrs. Hume under the lease from Rhineland, for the value of the buildings and improvements upon the premises. There is here no reference to the mortgage, or to the liability of Clark to pay it; and incorporating these provisions into the lease of May 1, 1858, would not affect its terms. It would add to the undertaking of the Messrs. Hume, but would not diminish their right to have the mortgage paid by Clark. Nor was Clark to derive any benefit from this fresh undertaking on the part of the Messrs. Hume, unless he concluded to take a renewal of the lease and applied therefor. Some action on his part was necessary and to be taken a reasonable time before the renewal could be required. (Leake on Con., 678; *M'Nitt v. Clark*, 7 J. R., 465; *Maxwell v. Ward*, 13 Price, 674.) It must be conceded that in this respect there was not only an entire omission on Clark's part, but by his own act he put it out of his power to make the election. The mortgage became due December 4, 1862. It had not been paid, and in the meantime Clark, on the 1st of February, 1860, for a valuable consideration, sold and transferred the two instruments above referred to of May first and August second to the Excelsior Fire Insurance Company, and in terms assigned

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to them all his right of renewal of said lease "or payment for buildings and improvements as therein provided, with all the premises therein mentioned and described, and the buildings thereon with the appurtenances," subject to the covenants and conditions contained therein, and all of which the insurance company undertook to perform; and subject also to the mortgage above mentioned. Afterwards through several mesne assignments similar in form to the one just referred to, the instruments of May first and August second, and the rights and privileges thereunder, became vested in one Lewis, and he, on the 20th of January, 1876, gave notice to the Messrs. Hume that he should not avail himself of the privilege of renewal given by the papers referred to, and on the 1st day of February, 1876, he surrendered the premises to them. There was not only then an omission on the part of Clark or his assigns to avail themselves of the privilege of renewal,—and on this depended the other rights,—but there was an absolute refusal to accept a renewal of the lease and it is difficult to see how, after that, any right, legal or equitable, under either of the instruments referred to, remained in Clark or his assigns. The Messrs. Hume were then at liberty to deal with the property and the interests conferred by the lease from Rhineland to them as they should choose. Under this lease it was optional with Rhineland at the expiration of the term granted by it (twenty-one years from the 1st day of May, 1855) to pay for the building erected by the Messrs. Hume on the premises, at a valuation ascertained as therein provided, or grant to them a new lease for the further term of twenty-one years at a rent fixed by certain persons to be selected for that purpose. On proceedings had for these purposes as provided in the lease the buildings were appraised at \$25,000, and the rent at which a new lease might be granted was fixed at \$5,000. Rhineland elected to give a new lease, but in the meantime, the mortgage remaining unpaid, he had, in December, 1875, begun proceedings for its foreclosure. Prior to the 14th of April, 1876, James Hume transferred his interest in

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the lease from Rhineland to William H. Hume and Alexander W. Hume, and they, on the nineteenth of April, sold the building erected by James and William Hume to Rhineland for \$20,000, which he paid, and they, (William H. and Alexander W. Hume), at the same time paid up the mortgage and costs of foreclosure, and took a lease of the premises from Rhineland for twenty-one years at the annual rent of \$6,400. In these events we are unable to discover any defense against the plaintiff's claim. The undertaking on the part of Clark, absolute in the first instance was not subsequently cut down or qualified. His liability was not for such deficiency as might remain due after the mortgaged premises had been sold and the proceeds applied upon the mortgage, but for the payment of the whole. Nor was it to save the Messrs. Hume harmless,—if that had been its purpose, very different language would have been employed,—but to pay the mortgage; and Hume's right of action was complete and perfect the moment the mortgage became due and remained unpaid. (*Port v. Jackson*, 17 J. R., 239; affirmed *id.*, 479; *Thomas v. Allen*, 1 Hill, 145; *Gilbert v. Wiman*, 1 N. Y., 550; *Rector v. Higgins* 48 *id.*, 532; *Belloni v. Freeborn*, 63 *id.*, 383.)

Nor am I able to see how the course pursued by Alexander and William Hume is open to the objection that it was legally prejudicial to Mr. Clark or his estate. None of the conditions undertaken by Clark were performed, and the Humes were bound to pay their bond and mortgage. There was nothing in the relations of the parties or in the various reciprocal obligations covered by the agreements in question which prevented them or their assigns from dealing with the property to their own advantage. The most favorable view of Clark's position is, that under the agreement of August 2d, he acquired an option which if he had retained and exercised would—as we now see—have entitled him to a further lease for the term of twenty-one years at the increased rent of \$5,000. He would still have been bound to pay the Hume mortgage, and would not have received

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anything for the value of the buildings ; for Rhinelanders having elected, as he lawfully might, to give the lease, was thus relieved from the other alternative and could not have been compelled to pay for the improvements. (*Rutgers v. Hunter*, 6 John. Ch., 215.) It is not unlikely that Lewis had in view this result when he surrendered the premises and refused to go further in the matter. At least he did not choose to be burdened with it. However that may be, he exercised the option which he had bought of Clark and declined the renewal, and this was binding and irrevocable. The plaintiff acted upon this refusal and made, as the defendant now claims, a good bargain ; but if so (although the answer alleges the contrary), this was done without fraud or misbehavior towards Clark or his assigns. Nor does the defendant even now offer to relieve William H. and Alexander Hume from the burden of this bargain ; they stand as lessees of the premises for the term of twenty-one years, at an annual rent of \$6,400, and if the defendant should succeed in this action, they would remain liable and the defendant free from the obligation assumed by his testator upon a full consideration. Such a result would be most unjust. ✓

As these views lead to the conclusion that the defendant established no defense, it is unnecessary to consider other questions presented by the learned counsel for the respondent ; for however answered they fail to disclose any ground on which the order of the General Term can stand. It should therefore be reversed, and the judgment entered on the report of the referee affirmed, with costs.

All concur.

Order reversed and judgment affirmed.

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CHARLES C. CORNES, Appellant, v. ANDREW J. WILKIN,
Executor, etc., Respondent.

The provisions of the Revised Statutes (2 R. S., 88, §§ 34, *et seq.*) in reference to publication by executors and administrators of notice to those, having claims against the deceased, to exhibit them, and the provision (§ 28) limiting the time for commencing suits upon claims disputed or rejected, include claims which are contingent, as well as those where the liability is certain and fixed.

Plaintiff and B., defendant's testator, were co-sureties upon an undertaking given on appeal; the judgment appealed from was affirmed July, 6 1873; an action was commenced against plaintiff August 28, 1873; judgment was perfected therein against him September 17, 1873, which he paid November 11, 1873. Defendant obtained an order for the publication of notice to creditors September 13, 1873, and such notice was on that day published. Plaintiff served upon defendant a claim for contribution, April 17, 1874, which was immediately rejected. This action upon such claim was commenced November 27, 1876. *Held*, that the six months limitation, prescribed in said statute, applied to the claim; that the fact that the first publication of notice was prior to the establishment of plaintiff's liability was immaterial; and that the action was barred.

Also, *held*, that an omission of a middle letter in the name of the testator, in the notice published, was immaterial: and that this was so, although there was a person living of the same name as that published, as the law recognizes but one Christian name, and as it did not mislead.

Defendant, in May, 1874, wrote to plaintiff's attorney, offering to submit the controversy under section 372 of the Code of procedure; said attorney wrote a letter in March, 1876, accepting the proposition, to which defendant made no reply. *Held*, that the offer was not a waiver of the statute; that to constitute a waiver the offer should have been accepted within the six months, and this followed by an actual submission.

(Argued November 20, 1879; decided December 2, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of defendant, entered upon an order setting aside a verdict in favor of plaintiff and directing judgment for defendant. (Reported below, 14 Hun, 428.)

This action was brought for contribution as between co-sureties.

On the 28th day of September, 1872, one Ann Burgess recovered a judgment in the Supreme Court against Joseph

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Eaton. Eaton appealed, giving a joint undertaking executed for that purpose, signed by the plaintiff and by the defendant's testator, Charles M. Brockway. On the 5th day of July, 1873, the judgment against Eaton was affirmed. Said Brockway died on the 3d day of January, 1873. On the 28th day of August, 1873, said Ann Burgess commenced an action against the plaintiff as surviving obligor on said undertaking, which action was prosecuted to judgment; said judgment being perfected September 11, 1873, execution thereon was issued, and plaintiff paid the amount of the execution on the 11th day of November, 1873. On the 13th day of September, 1873, the defendant, as executor, procured from the surrogate of Monroe county, who had jurisdiction thereof, an order for the publication of claims against the estate of his testator, and the notice for claims was first published, in accordance with said order on that day. On the 15th day of April, 1874, plaintiff presented to the executor a claim for contribution claimed to have accrued to him by virtue of his having paid the Burgess judgment, which claim the said executor rejected on the same day. This action was commenced the 28th day of November, 1876.

In the notice so published the deceased was called Charles Brockway; there was a Charles Brockway at that time living in the same town. On May 27, 1874, defendant wrote the plaintiff's attorney offering to submit the controversy under section 372 of the Code of Procedure. Said attorney wrote to defendant a letter March 6, 1876, accepting this proposition. No notice of this letter was taken by defendant. The court on trial directed a verdict for plaintiff for one-half the amount paid by plaintiff, subject to the opinion of the court at General Term. A verdict was rendered accordingly.

W. F. Cogswell, for appellant. Plaintiff's action was not barred by the six months statute of limitations. (2 R. S., 88, §§ 34-40; *Bk. of Fishkill v. Speight*, 47 N. Y., 668; *Hoyt v. Bonnett*, 50 id., 538.) That statute is only applica-

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ble to cases where the presentment and rejectment of the claim is after the publication of notice requiring creditors to present their claims against the estate. (*Tucker v. Tucker*, 4 Keyes, 136; *Hardy v. Ames*, 47 Barb., 413.) The proof of publication of notice by the executor to creditors to come in is necessary in order to bar plaintiff's claim. (*Broderic v. Smith*, 3 Lans., 26; *Whitmore v. Foose*, 1 Denio, 160; *Hardy, Admx. v. Ames*, 47 Barb., 414; *Murray v. Smith*, 9 Bosw., 691; *Hoyt v. Bonnett*, 50 N. Y., 542.) Notice requiring claims to be presented to the executor at the office of his attorney, giving his name and the number of his office and street, is not a compliance with the statute. (*Murray v. Smith*, 9 Bosw., 691; *Hardy, Admx. v. Ames*, 47 Barb., 415; *Whitmore v. Foose*, 1 Denio, 161.) Notice of rejection served on the claimant's attorney, who presented the claim, is not a compliance; the notice must be given personally to the claimant. (*Van Saun v. Farley*, 4 Daly, 165.) The presentation of claims by claimant, before publication, is not a compliance with the statute, and does not set it running. (*Whitmore v. Foose*, 1 Denio, 161; *Tucker v. Tucker*, 4 Keyes, 151.) Though plaintiff's claim was contingent only, and not within the statute, it was proper to present it to the executor. (*Whitmore v. Foose*, 1 Denio, 162; *Kidd v. Chapman*, 2 Barb. Chy., 422; *Hoyt v. Bonnett*, 50 N. Y., 545.) There was no absolute or certain debt, either in law or in equity, due from the estate before plaintiff paid the debt of the principal. (*Hoyt v. Bonnett*, 50 N. Y., 544; *Jones v. Barlow*, 62 id., 204.) Defendant by his proposition *per se*, waived the statute, and abandoned the effect of his notice of rejection. The statute was thereby suspended, and has never since been set in motion. (*Lawrence v. Trustees Orphan House*, 2 Denio, 585.)

Daniel Holmes, for respondent. The plaintiff's claim was⁺ barred by the short statute of limitations. (3 R. S. [6th ed.], § 49 [§ 38], p. 97; *Tucker v. Tucker*, 4 Keyes, 151; *Hardy*

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v. *Ames*, 47 Barb., 413.) The omission of the middle letter of Charles Brockway's name was immaterial; the law recognizes but one Christian name. (*Newton v. Porter*, 63 N. Y., 141; *Franklin v. Talmadge*, 5 J. R., 84; *Roosevelt v. Gardinier*, 2 Cow., 463; *Milk v. Christie*, 1 Hill, 102; *Aylesworth v. Brown*, 10 Barb., 167; *Van Voorhees v. Budd*, 39 id., 479; *Clafin v. Griffin*, 8 Bos., 689.) Publication in one newspaper was sufficient. (*Dolbeer v. Casey*, 19 Barb., 149.) This claim was a proper claim to present in writing within the six months. (*Selover v. Coe*, 63 N. Y., 438; *Hoyt v. Bonnett*, 50 id., 538; *Van Wyck v. Seward*, 18 Wend., 375; *Elwood v. Diefendorf*, 5 Barb., 399; *Howe v. Ward*, 4 Greenleaf [Mc.], 195; *Jackson v. Seward*, 5 Cow., 67; 8 id., 429; *Francisco v. Fitch*, 25 Barb., 150; 3 R. S. [6th ed.], p. 96, § 45; *Payne v. Mathews*, 6 Paige, 19; *Westerlo v. Evertson*, 1 Wend., 532; *White v. Story*, 43 Barb., 124; *Brockett v. Bush*, 18 Abb., 337; *Godding v. Porter*, 17 Abb., 375; *Matter of Whitlock's Estate*, 1 Tucker, 491; *Hoyt v. Bonnett*, 58 Barb., 529; Redfield's Surr. Practice, 292; *Elwood v. Diefendorf*, 5 Barb., 399; 8 Wend., 375, 386; *Howe v. Ward*, 4 Green., 195; *Russell v. Lane*, 1 Barb., 519.) A claim is rejected or disputed by not being allowed. (*Tucker v. Tucker*, 4 Keyes, 136; *Cooper v. Felter*, 6 Lans., 485; *Fort v. Gooding*, 9 Barb., 388.) There was no such subsequent negotiation as to waive the statute. (*Bk. Fishkill v. Speight*, 47 N. Y., 668.)

MILLER, J. Upon the appeal from the judgment in favor of the plaintiff, the General Term held that the action was barred by the statute of limitations and directed that a judgment be entered dismissing the plaintiff's complaint.

The statute, which it is urged, operates as a bar to the claim of the plaintiff (2 R. S., 89, § 38), provides that "if a claim against the estate of a deceased person be exhibited to the executor or administrator and be disputed or rejected by him, and the same shall not have been referred the claimant shall, within six months after such dispute or rejection, if the debt,

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or any part thereof, be then due, or within six months after some part thereof shall have become due, commence a suit for the recovery thereof, or be forever barred from maintaining any action thereon," etc. The claim of the plaintiff was as a co-surety upon a joint obligation with the testator upon an undertaking on an appeal. A suit was brought against the plaintiff and a judgment obtained, which was paid by him. The order for publication was made, and notice first published for creditors to present their claims, prior to the judgment and about two months before it was paid by the plaintiff; and the claim of the plaintiff was not presented until eight months after the notice had been first published, and was immediately rejected by the executor. This action was brought over two years and one-half after the claim was rejected. The plaintiff insists that the statute is only applicable to cases where the presentment and rejection of the claim is after the publication of notice for creditors to present their claims against the estate; that the plaintiff's claim was not one which was affected by the six months' statute, and it means only creditors who have claims which are due, or so certain and absolute that they can be presented at any time after the first publication, and not a contingent liability which, perhaps, may never arise. It is also urged that the claim of the plaintiff did not become fixed and absolutely certain until two months after the first publication, and hence he never had the benefit of the full six months to which he was entitled; and that the short statute of limitations did not apply.

The design of the statute, requiring the publication for creditors to present their claims, evidently was to give notice to persons holding demands, so that the executor or administrator might ascertain the amount of the indebtedness existing against the estate, and liquidate the same. It was not intended that any claim should be excluded; and the fact that the debt was not then due, or that it was dependent upon a contingency, and hence was in a condition of uncertainty, so that it could not be made out, would not,

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we think, prevent the operation of the statute of limitations where there was a failure to bring the suit within the time required. The statutes relating to claims against deceased persons comprehend a general system in reference to such demands. Section thirty-four provides for a publication of a notice to creditors requiring "all persons who have claims to exhibit the same, with the vouchers thereof," etc. The next section, thirty-five, authorizes the executor to require such voucher, and sections thirty-six and thirty-seven make provision for a reference to settle any claims and the proceedings to be had thereupon. These are preliminary to section thirty-eight, *supra*, which prescribes the time within which an action may be brought, and taken together establish that it was the intention of the law-makers that claims of every name, nature and description, which exist or are likely to exist against an estate, shall be presented as required, without defining with precision the character of such claims. They embrace those which are due, as well as such as are contingent and likely to become due, or which by any possibility may be established; and no good reason is shown why a person who may, perhaps, become liable to pay money, as a co-surety with a deceased person, should not make out and present a claim for contribution, the same as any other claimant against the estate of such co-surety. This principle is recognized in some of the reported cases. In *Hoyt v. Bonnett* (50 N. Y., 538), it was laid down that although the liability was contingent, it was proper to present the claims; and although such claims were not an absolute charge upon the estate, the contingent liability continues and cannot be disregarded or rejected by the executors. (See also *Francisco v. Fitch*, 25 Barb., 130; *White v. Story*, 43 id., 124.)

We think, therefore, that the claim might properly have been presented, even before judgment had been obtained against the plaintiff or he had paid the demand; and he lost nothing by the publication of notice prior to the time of its being established against himself. But even if it were

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otherwise, so long as the plaintiff had an opportunity to present and actually did present his claim after the advertisement, and no objection was made that it was not in due season, we do not see that he has lost any rights.

While it may be conceded that the statute must be strictly pursued, as the advertisement and notice were entirely regular, we think that the fact that the time of its first publication commenced prior to the establishment of the plaintiff's liability as surety has no bearing upon the question as to the limitation of time within which the action must be brought. The question is not when the advertisement began to take effect, but when the statute of limitations commenced running. The provisions of the statute as to the advertisement and presentation of claims is one thing; and that relating to the limitation of an action is another matter.

The advertisement prior to the time when the demand became fixed and certain has done the plaintiff no injury; and he had the same right to present, and he actually did so present his claim, and the same privilege to bring an action, as if the notice had been first given after his claim was perfect. The claim of the plaintiff's counsel, therefore, that he never had the benefit of the full six months in which to present his claim, after the first publication, is, we think, without merit and presents no valid ground for a reversal of the judgment.

The omission of the middle letter of the name of Charles Brockway was, we think, immaterial, as the law recognizes only one Christian name. It could not mislead the creditors, as it related to a person who was deceased; and the fact that another man was living of the same name did not alter the case. The plaintiff presented his claim by virtue of the order as published, and thus conceded that the claim was against the testator's estate.

It is also urged that there was a waiver of the statute, by the proposition of the defendant to submit the claim under section 372 of the Code. We think that this communication was merely intended to facilitate the disposition of the case,

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and did not in any way interfere with the written notice which had been given rejecting such claim. An offer to refer, after a refusal to pay, will not waive the statute: (*Bank of Fishkill v. Speight*, 47 N. Y., 668.) It may be added that the letter relied upon bore date a little over two months after the notice rejecting the claim, and it remained unanswered for nearly two years after it was sent. To constitute such waiver, the offer should have been accepted within the six months and have been followed by an actual submission, as proposed.

As the statute of limitations was a bar to the plaintiff's right of action, it is not necessary to consider the question whether the plaintiff, having paid the claim for which he and his co-surety became jointly obligated, has a right of action for contribution against the executor of his co-surety.

The judgment of the General Term should be affirmed.

RAPALLO and ANDREWS, JJ., concur; CHURCH, Ch. J., and EARL, J., concur in the result; DANFORTH, J., taking no part.

Judgment affirmed.

79	136
116	153
79	136
124	375
125	512
79	136
126	470
127	406
79	136
143	547

**SAMUEL HERBERT BROWN, by Guardian, etc., Respondent,
v. ODLE C. KNAPP as Administrator, etc. et al., Appel-
lants.**

Where a legacy to an infant, as to whom the testator is *in loco parentis*, is made payable when the infant becomes of age, and such legatee has no other provision in the meantime, or any maintenance allotted by the will, the legacy carries interest from the time of the death of the testator. It is not needed for the application of this rule that the testator should have been under a legal obligation at the time of his death to support the legatee; it is sufficient that he has voluntarily assumed such a relation, similar in some respects to that of parent, as that it may be presumed he did not intend to leave the legatee without support.

Where a legacy is given, and is directed to be paid by the executor, who is a devisee of real estate, such estate is charged with the payment of the legacy; and the devisee, upon accepting the devise, becomes personally bound to pay the legacy; and this, although the land devised to him proves to be less in value than the amount of the legacy.

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It seems, that payment of such a legacy may be enforced by a suit in equity against the real estate, or by an action directly against the devisee upon the promise to pay implied by the acceptance of the devise. An action to enforce the legal liability of the devisee and executor may be brought in this State, although the testator was a resident of, and said executor was appointed in another State.

In such case, however, where action is brought to recover interest during the minority of the legatee, as the cause of action arose in the other State, the rate of interest allowed by its laws should control.

In such an action, *held*, that plaintiff was not entitled to recover compound interest, but only simple interest at the rate of six per cent.

Plaintiff's father, who was the son of B., the testator, entered the military service of the United States in 1863. Before he entered the service B. said to him, that if he never returned his wife and son would always be cared for. After his departure B. took plaintiff and his mother to his (B.'s) house to live. Plaintiff's father died in the service; plaintiff and his mother continued to live with B., being supported by him until his death; plaintiff was at that time about seven years old. By his will B. gave to plaintiff \$3,000, which he directed his executor to pay when plaintiff attained the age of twenty-one years. The residue of his "real and personal estate" B. gave to his son W., whom he appointed executor. W. qualified and took possession of the estate. Plaintiff had no property, except that given him by the will. *Held*, that the evidence authorized a finding that the testator assumed the paternal care of plaintiff; that he was entitled to interest upon the legacy at the rate of six per cent per annum from the death of the testator, during his minority; and that W. was personally liable therefor.

The will gave to a daughter of the testator \$4,000, to be invested by the executor "for her use, support and maintenance during her natural life," with directions that if the interest should prove insufficient, the executor should apply so much of the principal as should be necessary for her support. *Held*, that the presumption in favor of plaintiff, as to interest, was not overthrown by the language used in this bequest.

The action was in form against W., as executor; the objection as to form was not taken below. *Held*, that while it would have been more proper to have brought suit against W., individually, yet, as the result is the same and as the objection, if it could be raised here was merely technical affecting no substantial right, the action would be treated as one to enforce the personal liability of W.

Brown v. Knapp (17 Hun, 160), reversed, but upon grounds not there discussed.

(Argued November 31, 1879; decided December 2, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming

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a judgment in favor of plaintiff, entered upon the decision of the court on trial without a jury.

This action was originally brought against William S. Brown, as executor of the will of Samuel Brown, deceased, to recover interest on a legacy given to plaintiff by said will. After the decision was filed, but before judgment was perfected, said defendant died ; by order of the court judgment was entered as of the date of the trial. The present defendants, the administrator with the will annexed of the said testator, and the administrators of the original defendant, were subsequently substituted as defendants.

The facts appearing on trial are set forth sufficiently in the opinion.

William H. Robertson, for appellants. Defendant being a foreign executor the court had no jurisdiction over him. (*Metcalf v. Clark*, 41 Barb., 45, 49; *Gulich v. Gulich*, 33 id., 92; *In re Well*, 11 Hun, 124.) The testator having fixed the time for the payment of the legacy in question, it begins to draw interest from that date only ; the exception which some of the cases have made in favor of a child where no provision is made for its support cannot be invoked in this case. (*Lupton v. Lupton*, 2 J. Chy., 614; *Van Bramer v. Hoffman*, 2 J. Cas., 200; *Wigram on Wills*, 343; *King v. Talbot*, 40 N. Y., 76.) The court erred in deciding that the plaintiff was entitled to interest at the rate of seven per cent per annum, and also to compound interest. (*Williamson v. Williamson*, 6 Paige, 298; *Talbot v. King*, 40 N. Y., 76; *Loeschigk v. Addison*, 19 Abb., 169.)

Gilbert O. Hulse, for respondent. The court below had jurisdiction of this action. (*Tunstall v. Pollard's Adm'r*, 11 Leigh, 1, 25 ; *Bryan v. McGee*, 2 Wash. C. C. R., 337 ; *Pugh's Ex'rs v. Jones*, 6 Leigh, 310 ; *Swaringen v. Pendleton*, 4 S. & R., 389 ; *Dowdale's Case*, 6 Co., 46 ; Cro. Jac., 55 ; *Evan's Adm'r v. Tatem*, 9 S. & R., 252 ; *Campbell v. Tousey*, 7 Cow., 64 ; *McNamara v. Dwyer*, 7 Paige, 239 ;

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Brown v. Brown, 1 Barb. Chy., 189; *Parsons v. Leyman*, 20 N. Y., 103, 125; *Despard v. Churchill*, 53 id., 192; *Dawes v. Royalston*, 9 Mass., 337; *Richards v. Dutch*, 8 id., 506; *Gulick v. Gulick*, 33 Barb., 92.) The legacy given to the plaintiff in the will of Samuel Brown, deceased, carries interest from the death of the testator, and the plaintiff is entitled thereto for his maintenance, education and support. (2 Williams' Exr's [7th ed.], 1239, 1428, 1429; *Heath v. Perry*, 3 Atk., 102; *Dundas v. Wolffe Murray*, 1 Hem. & M., 425; *Acherly v. Wheeler*, 1 P. Wms., 783; *Harvey v. Harvey*, 2 id., 21; *Nicholls v. Osborn*, 2 id., 419; *Taylor v. Johnson*, 2 id., 504; *Beckford v. Tobin*, 1 Ves., 308; *Lowndes v. Lowndes*, 15 Ves. Chy., 301; *Mills v. Roberts*, 1 Russ. & Myl., 555; *Chambers v. Goldwin*, 11 Ves. Chy., 81; *Hill v. Hill*, 3 Ves. & Beames, 183; *Brown v. Temperly*, 3 Russ. Chy., 263; *Mole v. Mole*, 1 Dick., 310; *Leslie v. Leslie*, Lloyd & Gould's R., 1; *Boldly v. Dawes*, 1 Keen's Chy., 362; *Magoffin v. Patton*, 4 Rawle, 119; 2 Roper on Leg., 190, chap. 20, § 3, and 192, § 4; *Shudal v. Jekyll*, 2 Atk., 516; *Pinney v. Faucher*, 3 Bradf., 198; *Cook v. Meeker*, 36 N. Y., 18, 19.) Where the testator is a parent of, or stands *in loco parentis* to a legatee, whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy will be allowed as a maintenance from the time of the death of the testator, if there is no other provision for that purpose. (*Acherly v. Vernon*, 1 P. Wms., 783; *Hill v. Hill*, 3 Ves. & B., 183; *Mills v. Roberts*, 1 Russ. & M., 555; *Leslie v. Leslie*, 4 Lloyd & Gould R.; *Rogers v. Soutten*, 2 Keene's R., 598; *Wilson v. Madison*, 2 Y. & C. Ch., 372; *Russell v. Dickson*, 2 Dru. & W., 133; *Harvey v. Harvey*, 2 P. Wms., 21; *Indedom v. Northcote*, 3 Atk., 438; *Chambers v. Goodwin*, 11 Ves., 2; *Brown v. Temperly*, 3 Russ. Chy., 263; *Mole v. Mole*, 1 Dick., 310; *McDermott v. Healey*, 3 Russ. Chy., 264, note; *Wynch v. Wynch*, 1 Cox, 433; *Donovan v. Needham*, 9 Beavan, 164; *Rudge v. Wiswall*, 12 id., 357; *In re Rouse Estate*, 9 Hare, 649.)

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EARL, J. Samuel Brown, the testator, died in October, 1867, at Greenwich, in the State of Connecticut, where he had for many years resided. He left a will which was proved and admitted to probate in that State, in which are the following provisions: He gives his wife the use of his dwelling-house and of one-third of his farm. He gives his daughter the sum of \$4,000, to be invested and applied by his executor for her use and maintenance during her life, the executor being directed in case the interest was insufficient for that purpose to apply so much of the principal from time to time as should be necessary for her support, and after her death so much thereof as remains to be divided among her children. He gives to the plaintiff \$3,000, in the following language: "I give, devise and bequeath to my grandson, Samuel Herbert Brown, the sum of \$3,000, and direct my executor hereinafter named to pay to him the said sum when he shall attain the age of twenty-one years; but if he shall die under that age without issue, then I give the same to my son, William S. Brown, and my daughter, Ann Jannett Lounsberry, equally;" and then the final clause of the will is as follows: "The rest, residue and remainder of my real and personal estate I give, devise and bequeath to my son, William S. Brown, and I constitute and appoint him sole executor of this my will."

At the time of his death the testator owned in that State real and personal property of about the value of \$16,000, nearly \$11,000 of which was real estate. William S. Brown qualified as executor, took possession of the estate, and made and filed an inventory thereof; and before the commencement of this action he had made a final settlement of his accounts as such executor in the Probate Court of Greenwich, and a final decree in reference thereto had been entered. At the time of the death of the testator, and from thence to the rendition of judgment in this action, William S. Brown was a resident of this State. At the testator's death the plaintiff was about seven years old. In 1863 he resided with his father, a son of the testator, together with his mother,

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in the city of New York, and his father early in that year entered the military service of the United States. Before he entered such service, the testator said to him that if he never returned, his wife and son would always be cared for. After the departure of plaintiff's father, the testator went to New York and took the plaintiff and his mother to his home to live, and in August afterward plaintiff's father died at Baton Rouge. The plaintiff and his mother continued to live with the testator and to be supported by him until his death. He always treated the plaintiff with great kindness and affection, and avowed an intention to educate him. We think the court at Special Term was justified in finding that the testator assumed the paternal care of the plaintiff and took the place in that respect of his father.

After the testator's death, the plaintiff's mother married again, and he with her moved into this State, where he resided at the time of the commencement of this action. The court found that the plaintiff had no property except that given him in the will of his grandfather.

The plaintiff, at the time of the commencement of this action, was about sixteen years old, and this action was commenced against William S. Brown, the executor, to compel him to pay the interest upon plaintiff's legacy of \$3,000 from the death of the testator, such interest having been demanded and payment thereof refused. The executor claimed that the legacy did not carry any interest until it was payable; and that claim presents the only issue upon the merits in this action.

The general rule is, that when a time is specified for the payment of a legacy and there is no direction as to interest, the legacy will carry interest only from the time the legacy is payable. But to this rule there is a well defined exception. When there is a legacy to a minor child or to an infant, as to whom the testator is *in loco parentis*, and such legatee has no other provision nor any maintenance, in the meantime, allotted by the will, the legacy, although payable at a future day, carries interest from the death of the testa-

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tor. This rule is based upon the presumption that the testator in such case must have intended that the legatee should in the meantime be maintained at his expense, thus discharging his moral obligation or carrying out his benevolent design: (*Lupton v. Lupton*, 2 Johns. Ch., 614; *Cooke v. Meeker*, 36 N. Y., 18; *Lowndes v. Lowndes*, 15 Vesey, 301; *Hill v. Hill*, 3 Vesey & B., 183; *Leslie v. Leslie*, 1 Lloyd's & Goold's, 1; *Magoffin v. Patton*, 4 Rawle, 119; *Harvey v. Harvey*, 2 P. Williams, 21.) It is not needed for the application of this rule that the testator must have been under a legal obligation, at the time of his death, to support the legatee. Such obligation of a testator to support his own child continues only during his life. It is sufficient for the operation of this rule that the testator has voluntarily assumed in reference to the legatee such a relation,—similar in some respects to that of parent—that it may be presumed that he did not intend to leave the legatee without support. The duty of the testator in this case, to provide for and support this infant grandchild, was almost, if not quite as strong as that of supporting his own children, and it must be presumed that he meant to discharge that duty. This presumption is not overthrown by the language used in the bequest to his daughter. She was an adult, and he did not mean that she should have or control the legacy to her. But he desired that she should be supported out of it, and hence he provides that his executors shall invest the \$4,000 and pay her the interest thereof, and as much also of the principal as may be needed for her support. These special provisions made it necessary for the testator to use language differing from that used in the bequest to the plaintiff. This legacy, therefore, carried interest from the death of the testator.

The executor also contended that this legacy was payable only out of the personal estate, and that there was not sufficient of such estate to pay the two legacies given in the will. It is claimed on the part of the plaintiff that the legacy was charged upon the real estate; and I am of that opinion. It

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is well settled that when a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy. And the rule is the same when the legacy is directed to be paid by the executor who is the devisee of real estate. (2 Redf. on Wills, 209; *Mensch v. Mensch*, 2 Lans., 235; *McLachlan v. McLachlan*, 9 Paige, 534; *Wood v. Wood*, 26 Barb., 356; *Dodge v. Manning*, 1 N. Y., 298; *Reynolds v. Reynolds*, 16 id., 257; *Gridley v. Gridley*, 24 id., 130; *Harris v. Fly*, 7 Paige, 421; *Olmstead v. Brush*, 27 Conn., 530.) If the devisee, in such case, accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound even if the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape responsibility, he must refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy which he is directed to pay. Here William S. Brown, the executor, was directed to pay this legacy, and he was the devisee of the real estate; and hence the land not only was charged with the legacy, but the devisee became personally liable to pay it—principal as well as interest.

The payment of such a legacy can be enforced by a suit in equity against the real estate, or by a common law action directly against the devisee upon the implied promise to pay it—a promise implied by his acceptance of the devise.

Hence the liability of William S. Brown to pay this interest cannot be doubted, and the plaintiff, therefore, established against him a meritorious cause of action.

But it is further claimed on the part of the defense that this suit could not be maintained in this State, because William S. Brown was appointed executor in the State of Connecticut. As this real estate was situated in that State, an action could not be maintained here to enforce the charge against it. But this action is solely to enforce payment of the legacy by the defendant. It is true that the action is in form against him as executor. It should more properly

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have been brought against him, ignoring his character as executor, upon the theory that by his acceptance of the devise he became personally liable to pay the legacy. But this matter of form has nowhere been objected to; and as the result is the same, and as the objection if it could now be taken, would be merely technical, affecting no substantial right, the action may now be treated as if it were one against him to enforce his personal liability to pay the legacy. An action to enforce such a liability may, without doubt, be brought in this State. It is based upon an implied assumpsit and may be brought anywhere, like any other transitory action. There is the same right to sue upon this implied promise here that there would have been if William S. Brown had given his note or bond, or any other express promise in the State of Connecticut to pay the same sum.

As this cause of action arose in Connecticut, upon an implied contract which came into existence there, it is claimed that the rate of interest authorized by the laws of that State should control. I am of that opinion; but there was no proof what the laws of that State are as to interest. This is all the case shows on that subject. At the close of the evidence it is stated as follows: "The defendant's counsel to have the privilege of introducing further evidence as to the laws of the State of Connecticut in regard to the legacy drawing interest, if he shall so desire. Such evidence was afterward offered." It does not appear what the evidence was which was offered, and it does not appear that any evidence was, in fact, received; and no evidence as to such laws appears in the case, and there was no finding by the court or request to find as to such laws. It will be observed that the privilege reserved was not as to the rate of interest. What law, then, was the court bound to administer as to the rate of interest? Clearly the law of this State, as no other guide or rule was furnished. (*Savage v. O'Neil*, 44 N. Y., 298.) As the laws of all civilized countries allow interest at some rate, the court could assume, in the absence of proof, that the laws of Connecticut allowed

interest, and in enforcing the obligation of the defendant to pay, it could not do otherwise than to take the rate allowed by our laws. The rate of interest allowed by the Connecticut laws not being proved, the court could allow a reasonable rate and take the rate allowed by our laws as the reasonable rate. As no proof was made as to the rate of interest, and no question made about it at the trial, it may also be assumed that both parties were willing that the rate of interest allowed in this State should control.

But the claim is also made that the amount of interest allowed was too great. The court allowed compound interest at the rate of seven per cent from the death of the testator. In this there was manifest error, upon any theory. Full, simple interest at seven per cent should have been allowed. This should not be treated like an action against a trustee who is bound to invest a fund and pay over the interest. In such a case it would generally be too much to allow full, simple interest at seven per cent, because no trustee can be expected to make so much interest during a series of years; and particularly it would be unjust to allow so much interest over and above taxes and commissions. But here this was interest which William S. Brown owed upon his own debt—not upon a fund which he was bound to invest as trustee. It was due from him in the same sense that it would have been if he had given his bond to pay the \$3,000, with annual interest, and he was bound to pay the annual interest without any deduction for taxes or commissions. But he was not liable for compound interest. If a creditor fails to collect the interest due from his debtor, he can never compound it. Compound interest at some rate is sometimes allowed against trustees who have been guilty of bad faith or some other wrong to the beneficiaries of the trust. But, as I have said, this is not a case of trust. It is a case of an implied promise to personally pay the legacy with the interest. It is simply like the case of an action of assumpsit to collect the interest upon a bond or other obligation, the principal of which is payable at a future

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day. There was error, therefore, in the allowance of the sum of \$649.88 for the interest upon the interest.

I have carefully examined the other alleged errors, but do not find any of which the appellant can justly complain.

The appellant, however, complains of the form of the judgment. That should have been corrected by motion in the Supreme Court; but as we have to modify the same, we will order it corrected.

The judgment of the General Term must be reversed, and that of the Special Term modified by striking therefrom the sum of \$649.88, and by making the same simply a personal judgment in the ordinary form for the balance, with the costs prior to the appeal in the Supreme Court, and, as thus modified, affirmed, without costs of appeal in the Supreme Court or to this court to either party.

All the judges concur, except that Judges RAPALLO, ANDREWS, MILLER and DANFORTH hold that the rate of interest should be but six per cent. There must, therefore, be a further deduction of \$289.20.

Judgment accordingly.

79	146
130	606
79	146
134	577

GEORGE W. BERGEN, JENNIE E. SNEDEKER et al., Respondents, v. COLES CARMAN, Appellant.

Where an order of General Term, reversing an order of Special Term, as to the disposition of surplus moneys in a foreclosure suit, and sending the case back to the referee, imposes costs absolutely, in this respect it is a final decision, and an appeal to this court can be taken.

It seems, that in the absence of such a provision as to costs the order is not appealable.

Upon a reference as to surplus moneys in such an action, the referee has authority to inquire as to the validity of conveyances or liens; and conveyances, as well as liens, may be attacked as fraudulent.

King v. West (10 How. Pr., 333), questioned.

Where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and

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the purchaser has the right to impeach the conveyance upon such a reference; he is not bound to bring ejectment, or an action to set aside the conveyance.

(Argued November 11, 1879; decided December 9, 1879.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, reversing an order of Special Term, awarding surplus moneys in a foreclosure suit.

The referee to whom the matter was referred found, substantially, the following facts: That prior to November 3, 1874, the defendant, Seaman N. Snedeker, the mortgagor, was the owner of the mortgaged premises. By a conveyance, dated on that day, executed by himself and Jennie E. Snedeker, his wife, for the expressed consideration of \$600, said premises were conveyed to James H. Campbell, subject to the mortgage herein, but without payment thereof being assumed by the grantee; said conveyance also contained a covenant that there were no other liens or incumbrances upon said premises than said mortgage. The value of said premises at the time of this conveyance was \$10,000. That said James H. Campbell, by a conveyance dated June 8, 1875, conveyed the premises to the defendant, Jennie E. Snedeker, for the expressed consideration of \$700, subject to said mortgage, payment of which was not assumed by the grantee. This conveyance also contained a covenant that there were no other liens or incumbrances on said premises. About the time of these conveyances, two other pieces of property were conveyed by the defendant Snedeker and wife to said Campbell, for the nominal consideration of ten dollars, which Campbell subsequently conveyed to Snedeker's daughter, without any consideration being paid him therefor. No part of the \$600 expressed as the consideration in the deed from Snedeker and wife to Campbell was ever paid. For the purpose of going through the form of a payment, Snedeker handed Campbell some money, and his own check for an amount sufficient with the money to make the amount of the expressed consideration, and Campbell passed the money and check back to Snedeker. No consideration was paid to Campbell for the con-

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veyance from him to the defendant, Jennie E. Snedeker. After the conveyance from Snedeker and wife to Campbell, Snedeker remained in possession of the premises and continued to occupy them until after the sale herein. At the date of the conveyance from Snedeker and wife to Campbell, Snedeker was largely in debt. About the time this conveyance was acknowledged his creditors were suing him, and within two months he made a general assignment of his property for their benefit. The referee found that the conveyances from Snedeker and wife to Campbell, and from Campbell to Jennie E. Snedeker, were made for the purpose of putting the property of Snedeker where it could not be reached by his creditors, and were in fraud of their rights.

By a mortgage dated May 1, 1877, Snedeker and his wife mortgaged the premises in question to John H. Clayton, to secure the payment of the sum of \$800. Prior to the making of said mortgage, Clayton had been retained as counsel to defend the title of said Jennie E. Snedeker to the said premises, in certain actions which had been commenced in behalf of various judgment creditors of Snedeker, for the purpose of having the conveyance from himself and wife to Campbell, and from Campbell to her set aside, on the ground of fraud; and this mortgage was given in payment of the services of Clayton, rendered and to be rendered as such counsel, and was taken by him with full knowledge of the alleged fraud.

In July, 1875, three judgments were obtained against Snedeker. Executions were issued to the sheriff on each of said judgments. On the 4th day of December, 1875, the sheriff, by virtue of said executions, sold all the right, title and interest, of which the defendant Snedeker was seized or possessed, on the 6th day of July, 1875, or at any time afterwards of, in and to the premises to the claimant Coles Carman, and gave him a certificate of sale. Fifteen months, after such sale, and the giving the certificate thereof and due filing thereof having expired, without any redemption of the premises having been made, said sheriff executed and delivered to Carman a conveyance of interest of the Snedeker.

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The referee found, as matter of law, that the conveyance from Snedeker to Campbell and from Campbell to Mrs. Snedeker were void as against the creditors of Snedeker, as was also the mortgage to Clayton; that the conveyance from the sheriff to Carman passed to him the fee subject to the mortgage foreclosed, and to the inchoate rights of dower of Mrs. Snedeker; that the latter was entitled to have one-third of the surplus retained in the hands of the county treasurer until her said right became consummate or extinct; and that Carman was entitled to the residue of the surplus and the interest accruing on that part retained, until said dower might become consummate or extinct, and the principal when it became extinct. This report was confirmed by the Special Term and order entered accordingly. The order of General Term reversed the order of Special Term and sent the matter back to the referee; it imposed costs absolutely upon the respondent. The reversal was upon the ground that Carman got no title by the sheriff's deed.

A. N. Weller, for appellant. Where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser may impeach the conveyance in a suit at law to recover the premises. (*Chautauqua Co. Bk. v. Risley*, 19 N. Y., 369; *Erickson v. Quinn*, 15 Abb. [N. S.], 168; *Lamont v. Cheshire*, 65 N. Y., 30; 14 J. R., 493.) The fraudulent transfer of the property could be ascertained and adjudged in a reference to get surplus moneys. (2 R. S., 192, § 89; Story's Eq., § 64 *k*; Willard's Eq., 48; 60 Barb., 178; *Mut. Ins. Co. v. Bowen*, 47 id., 618; *Schafer v. Keilly*, 50 N. Y., 61; *Halstead v. Halstead*, 55 id., 442.)

John H. Clayton, for respondents. The referee had no power to inquire into the validity or invalidity of the deeds from Snedeker to Campbell, and from Campbell to Mrs. Snedeker, and the mortgage from Mrs. Snedeker and her husband to Clayton. (Rule 77 [now 68], Supreme Court;

Opinion *per Curiam*.

King v. West, 10 How., 333; *Husted v. Dakin*, 17 Abb., 141; *Union Dime Svs. Instn. v. Olsey*, 4 Hun, 657; *Bradley v. Aldrich*, 40 N. Y., 509; 1 N. Y. Monthly Law Bulletin, 50, ¶ 104.) If the referee had had power to try a creditor's bill in a proper case, the validity of these conveyances could not in these proceedings have been inquired into. (*Crippen v. Hudson*, 3 Kern., 164; *Sturges v. Vanderbilt*, 73 N. Y., 391-392; *Coe v. Whitbeck*, 11 Paige, 42; *Genesee R. Nat. Bank v. Mead*, 18 Hun, 306.) Carman's ownership in the premises and surplus is subject to Clayton's mortgage. (*Moselly v. Moselly*, 15 N. Y., 334; *Jackson v. Garnsay*, 16 J. R., 189; Bump on Fraud. Conv., 442, 443.) He is not a creditor, but simply a purchaser with a title liable to be defeated or protected under the recording act, as he shall record, or neglect to record, his deed. (*Weaver v. Togood*, 1 Barb., 238; *Kleinholz v. Phelps*, 6 Hun, 568; *Russell v. Allen*, 10 Paige, 254; *Forsyth v. Clark*, 3 Wend., 637; *Hill v. Bixby*, 63 Barb., 200; 2 R. S. [3d ed.], 1137, § 1; *Hetzel v. Barber*, 69 N. Y., 1; 3 Abb. Dig. [new ed.], ¶ 132; *Hope F. Ins. Co. v. Cambrelling*, 1 Hun, 493; *Barto v. Tomp. Nat. Bank*, 15 Hun, 11; *Reynolds v. Darling*, 42 Barb., 418.) The only remedy of a purchaser under a sheriff's deed, to get possession or perfect his title to the premises, is an action of ejectment, a common law and jury action. (*Bockes v. Lansing*, 74 N. Y., 437; *Rogers v. Sinsheimer*, 50 id., 649; *Erickson v. Quinn*, 15 Abb. [N. S.], 168; *Chautauqua Co. Bk. v. Risley*, 19 N. Y., 370; *Cagger v. Lansing*, 64 id., 428.)

Per Curiam. The order of the General Term reversed the order confirming the report of the referee and directed that the case be referred to the referee to report as to priority of liens.

This is not a final order, and inasmuch as, upon the report of the referee as to this priority of the liens, the court at Special Term may hold that the moneys be retained to await the determination of a suit to be brought to test the right

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of the parties to the moneys, we think the order is not appealable to this court.

The appeal must, therefore, be dismissed, with costs.

All concur.

A subsequent motion was made for re-argument, resulting as follows :

MILLER, J. In granting the order dismissing the appeal in this case, the court overlooked the fact that the order appealed from imposed costs of the appeal upon the appellant (the respondent there) absolutely and not conditionally, and in this respect was a final determination from which an appeal could lawfully be taken. The motion for a re-argument must, therefore, be granted, and the order dismissing the appeal vacated. In this aspect of the case, the questions presented for review upon the appeal are open for consideration.

We think that the referee, by virtue of the order to ascertain and report the liens and their priorities in reference to the surplus moneys, had authority to inquire as to the validity of the conveyances under which Mrs. Snedeker claimed, and of the mortgage of herself and husband to Clayton. The object of the reference was to ascertain to whom the surplus moneys belonged ; and this opens a door to an inquiry as to the character of all liens which may be presented. No reason exists why the fraudulent character of conveyances cannot be tested in these proceedings, as well as that of all other liens. One of the objects and purposes of a foreclosure suit is the distribution of the fund arising upon a sale. (*Livingston v. Mildrum*, 19 N.Y., 441, 442; *Beekman v. Gibbs*, 8 Paige, 511, 512.) In the case first cited it was held that the rights and equities of the defendants, who were lienors or claimants of the equity of redemption, are as much before the court, and as much the objects of its care, as those of the owner of the mortgage primarily to be foreclosed. Why then should not the court have power to ascertain when liens are fraudulent? Where jurisdiction of a

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court of equity is once acquired, such court, as a general rule, has the right to proceed and do justice between all the parties.

The power of the court to settle questions of this character is also, we think, fully sustained by the decisions. In *Halstead v. Halstead* (55 N. Y., 442), in an action for a partition of lands, it was held that on a reference as to title, a party could attack a mortgage held by another party, on the ground that it was fraudulent and void as against creditors. It was said in the opinion by ANDREWS, J., that the inquiry as to the existence and amount of the lien involved the further question as to its validity; and the court having taken possession of the fund for distribution, directs proofs to be taken as to liens and adjudges the distribution. (See also *Schafer v. Reilly*, 50 N. Y., 61; *Mut. L. Ins. Co. v. Bowen*, 47 Barb., 618.) These cases fully sustain the principle that where a reference is ordered as to surplus moneys, that a lien may be attacked on the ground of fraud; and it matters not, we think, whether the action be a partition or a foreclosure suit. In fact, this is a most convenient practice in the disposition of claims in such cases, without the tedious process and the expense of a distinct and separate action for that purpose. The cases cited to sustain a different rule are not, we think, of sufficient weight to require special consideration. *King v. West* (10 How., 333), was a Special Term decision; and in whatever light the other cases relied upon by the respondent may be regarded, they are overruled by the decisions of this court already considered.

The claim that the Clayton mortgage must be sustained, even although the other conveyances are declared fraudulent and void, is not well founded. Clayton had full knowledge of the alleged fraud; knew that a suit had been brought to set aside the deeds on account of the fraud; and, in fact, the mortgage was given to him to secure the payment of his charges for defending the title of Mrs. Snedeker. It is also an answer to this position that the sheriff's certificate of the sale to Carman had been filed and recorded in the county

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clerk's office, long prior to the mortgage ; and he had notice not only that the mortgagor's title was fraudulent, but also of the appellant's claim to the property by virtue of the sheriff's sale : (2 R. S., 370, § 43.)

As to the right of Carman to sell and acquire a title under his judgment, it is well settled that where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser will have the right to impeach the conveyance, in an action at law to recover the premises : (*Chautauqua Co. Bank v. Risley* 19 N. Y., 369-375.) He may, but he is not bound to file a creditor's bill to set aside the conveyance : (See also *Erickson v. Quinn*, 15 Abb. [N. S.], 168.)

The case of *Lamont v. Cheshire* (65 N. Y., 30), is not in conflict with the position stated. The same remark is applicable to *Bockes v. Lansing* (74 N. Y., 437). Carman was not, therefore, bound to bring ejectment, or an action to set aside the conveyances, and had a right, we think, to contest the validity of the deeds and mortgages upon the reference.

We have carefully considered all the questions presented and the suggestions made by the respondent's counsel and are of the opinion that the referee was right, and that the General Term erred in reversing the decision of the Special Term.

The order of the General Term must, therefore, be reversed and that of the Special Term affirmed, with costs of both parties upon the appeal, to be paid out of the fund.

All concur.

Ordered accordingly.

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79	154
156	398

79	154
172	1540

DAVID W. BRUCE et al., Executors, etc., Appellants, v.
THE FULTON NATIONAL BANK OF THE CITY OF NEW
YORK, Respondent.

From the words of an express covenant, an additional or correlative covenant may be implied, if the language used shows that such covenant was intended; but such implication cannot be permitted where it is apparent from the contract that the parties had the subject in mind, and either one has withheld a promise in regard to it.

A lease under seal, drawn technically in form, and with obvious attention to details, contained various covenants, some binding the parties mutually, some the lessor only, others the lessee. It contained a covenant, on the part of the lessor, to the effect that if the lessee should pay the rents, and perform all the covenants on his part, that the lessee "shall and will at the end or expiration of the term," grant to the lessee a new lease for a further term specified, at a rent to be adjusted by appraisers, but not less than that for the first term. In an action to compel the lessee to accept a new lease, *held*, that this was a covenant, on the part of the lessor only, from which no covenant, on the part of the lessee, to take a new lease, could be implied; and that it was optional with him, whether or not, to take a new lease.

Johnson v. Conger (14 Abb. Pr., 195); *Pordage v. Cole* (1 Williams' Saunders, 319); *Butler v. Thompson* (2 Otto [92 U. S.], 412), distinguished.

(Argued November 21, 1879; decided December 9, 1879.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, reversing a judgment in favor of plaintiffs, entered upon a decision of the court, on trial at Special Term, and ordering a new trial. (Mem. of decision below, 16 Hun, 615.)

This action was brought to compel defendant, as lessee of certain premises in the city of New York, to accept a renewal of the lease for a further term.

The question was simply as to the construction of the lease, of which the following is a copy:

"This indenture, made the 28th day of February, in the year 1856, between Dorothea A. L. Wolfe, wife of John David Wolfe, and the said John David Wolfe of the first

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part and Joseph Kernochan, president of the Fulton Bank, in the city of New York, pursuant to the statute in such case made and provided, receiving the term of years hereby granted, and acting and covenanting for and in behalf of the said the Fulton Bank, in the city of New York, of the second part. Witnesseth, that the said parties of the first part have letten, and by these presents do grant, demise and to farm let unto the said party of the second part all that certain lot, piece or parcel of land, with the messuage or tenement thereon, situated in the second ward of the city of New York, contained within the following bounds, to wit: Commencing at a point on the south-easterly side of Pearl street, distant eighteen feet six inches north-easterly from the most easterly corner of Pearl and Fulton streets; running thence south-easterly on a straight line parallel with Fulton street, and through the center of the party-wall between the house on the lot hereby demised and the house on the lot next adjoining belonging to the Fulton Bank, in the city of New York, forty-eight feet two inches; thence running north easterly in a straight line twenty-two feet to a point distant on the course next stated, forty-seven feet two inches south-easterly from the south-easterly side of Pearl street; running thence north-westerly on a straight line forty-seven feet two inches to a point on the south-easterly side of Pearl street, distant forty-nine feet north-easterly from the said most easterly corner of Pearl and Fulton streets; running thence south-westerly along the south-easterly side of Pearl street thirty feet four inches to the point of beginning. To have and to hold the same unto the said party of the second part, and his successors and assigns, from the 1st day of May (at twelve o'clock at noon of that day), in the year 1856, for and during the full end and term of twenty-one years, yielding and paying for the same to the said Dorothea A. L. Wolfe, or to her heirs or assigns, the rent or sum of \$1,600 yearly and every year during the said term, in equal quarterly payments, to be made on the first day of every month of August, November, February and May in each and every

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year during the time hereby demised. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, that it shall be lawful for the said Dorothea A. L. Wolfe, her heirs or assigns, to re-enter the said premises and to remove all persons therefrom. And the said party of the second part, for himself, his successors or assigns, doth hereby covenant to pay to the said Dorothea A. L. Wolfe, her heirs or assigns the said yearly rent as herein specified; and also to pay all assessments ordinary and extraordinary; also all taxes that may be assessed, taxed, imposed or levied on said demised premises during said term. And the said parties of the first part, do hereby covenant and agree, that the said party of the second part, his successors or assigns, on paying the said yearly rent and performing the covenants and agreements herein contained, on the part and behalf of the said party of the second part, his successors or assigns, that the said party of the second part, his successors or assigns, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid. *And the said parties of the first part, do hereby covenant and agree, that if the said party of the second part, or their assigns, shall well and truly pay the rent hereby reserved, and keep and perform all the covenants herein contained, on the part and behalf of the said party of the second part, his successors or assigns, that the said Dorothea A. L. Wolfe, her heirs or assigns, shall and will, at the end or expiration of the term hereby granted, grant unto the said party of the second part, or his successors or assigns, a new lease of said premises hereby demised, for a further term of twenty-one years next ensuing, from the time of the expiration of the term hereby granted, at such annual rent (not less than the rent hereby reserved) as shall then have been agreed upon by the parties, or otherwise determined or ascertained as hereinafter provided.* And it is mutually covenanted and agreed between the parties hereto, that if the said Dorothea A. L. Wolfe, her heirs or assigns, and the said party of the

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second part, his successors or assigns do not agree on the amount of rent to be reserved on said renewed lease, then the said Dorothea A. L. Wolfe, her heirs or assigns, shall nominate one fit and impartial person, and the said party of the second part, his successors or assigns, shall nominate one fit and impartial person, both of whom shall be owners of real estate in said city to value the fee-simple of said demised premises, said premises to be valued as vacant or unimproved land, said nominations to be made at least four months before the expiration of the term hereby granted, and if the persons so chosen shall differ in judgment as to the value of the said premises, the two so appointed shall appoint a fit and impartial person to be associated with them for that purpose, and the decision if any two of the three persons so chosen as to such value, shall be conclusive on the parties interested, and the interest at the rate of five per cent per annum on the value so estimated, shall be the annual rent to be reserved by said new lease, provided such rent is not less than the rent hereby reserved, the said new lease to contain the same covenants herein contained except the covenants to renew, and said new lease to contain a covenant on the part of said Dorothea A. L. Wolfe, her heirs or assigns, to renew the lease for another term of twenty-one years as hereinafter provided. And the said parties of the first part, do hereby covenant and agree, that if the said parties of the second, his successors and assigns, shall well and truly keep and perform all the covenants herein contained on his part, and truly pay the rent to be reserved in said renewed lease for the second term hereinbefore provided, and shall and will, keep and perform all the covenants contained in said new lease as herein provided, on the part and behalf of the said party hereto of the second part, his successors and assigns; the said Dorothea A. L. Wolfe, her heirs and assigns shall and will, at the end or expiration of the said second term, grant unto the said party of the second part, successors or assigns, a new lease of said premises hereby demised, for a further term of twenty-one

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years next ensuing, from the time of the expiration of said second term at such annual rent (not less than the rent reserved for the term hereby granted) as shall then have been agreed upon by the parties or otherwise determined or ascertained as hereinafter provided. And it is mutually covenanted and agreed between the parties hereto, that if said Dorothea A. L. Wolfe, her heirs or assigns and the said party of the second part, his successors or assigns do not agree on the amount of rent to be reserved on said last renewal the amount of rent shall be ascertained and fixed at a sum not less than the rent hereby reserved, in the manner hereinbefore provided, with respect to the rent to be reserved on the first renewal of this lease. The said lease for the said third term of years to contain the same covenants as is herein contained except the covenant for renewal. It is further covenanted and agreed between the parties hereto, that in the event any part of the lot of land and premises hereby demised shall be taken for the purpose of the widening or extending of any street or avenue, or for a square or other public purpose at any time during the term hereby granted, or any term granted in renewal as hereinbefore provided, all awards for the ground or for the use of the ground so taken (exclusive of the building), shall inure and be paid to the said Dorothea A. L. Wolfe, her heirs and assigns, and after any part of said premises shall be so taken a deduction shall be made in the rent hereby reserved or reserved by any such renewed lease, such deduction amounting to a sum per annum equal to the interest at the rate of five per cent per annum on the amount received by or awarded to the said Dorothea A. L. Wolfe, her heirs or assigns, the said deduction to commence from the time said award shall be payable. It is further covenanted and agreed between the parties hereto that at least ninety days previous to the expiration of the last renewed or third term of twenty-one years, if said last term shall be granted in pursuance of the covenants and conditions herein contained, the lot of land hereby demised, or so much thereof

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as shall not have been taken for any public purpose, shall be valued and appraised as a vacant lot by arbitrators appointed in the manner hereinbefore provided for on the renewal of this lease, and that the said party of the second part, or his successors acting for and in behalf of said the Fulton Bank, in the city of New York, or his or its assigns, shall purchase said lot at such its appraised value, and that the said Dorothea A. L. Wolfe, her heirs or assigns shall and will, at the expiration of said third or last term if granted as aforesaid sell, and on receiving such appraised value, grant and convey to the said party of the second part his successors or assigns the lot of land hereby demised in fee simple free from all liens or incumbrances, except such liens or incumbrances as the said party of the second part his successors or assigns may have suffered or permitted to be on said premises, or which by the covenants or agreements herein, or in any lease given in renewal hereof, the said party of the second part, his successors or assigns should have paid, removed or prevented. It is further covenanted and agreed between the parties hereto that the said party of the second part, his successors or assigns, shall have a right to remove the buildings now on said demised premises and to erect such other buildings and improvements thereon as he or they shall see fit, and that the contents and dimensions of the premises hereby demised are as the same are hereinbefore given and set forth, and said dimensions so given are by these presents established and agreed upon between the parties hereto as the true and correct boundaries and dimensions of said lot.

“In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

“DOROTHEA A. L. WOLFE. [L. s.]

“JOHN DAVID WOLFE. [L. s.]

“JOSEPH KERNOCHAN, [L. s.]

“*President of the Fulton Bank.*”

A. P. Man, for appellants. While the express covenants in the lease leave no room for doubtful construction, yet if

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the terms were less direct, and if the lease in form only bound the lessor to grant a renewal, the law would imply that the lessee was bound to accept it so long as no option was expressed. (*Mayor, etc. v. Mabie*, 13 N. Y., 151; *Johnson v. Conger*, 14 Abb., 195; Shepard's Touchstone, 53, 162; Co. Litt., 47 b; 1 Leon., 324; 1 Ch. Ca., 294; 2 Mod., 91; 1 Platt on Leases, 706; *Ld. Frankford v. Thorpe*, 2 Ball & B., 372; *Curry v. Stanley*, 1 Il. & J., 487; *Butler v. Thomson*, 2 Otto [U. S.], 412; *Pordage v. Cole*, 1 Wm. Saunders, 319; *Hud. C. Co. v. Penn. Coal Co.*, 8 Wall., 276.)

S. P. Nash, for respondent. It was error to imply a covenant to renew on the part of the lessees, such covenant not being contained in the lease. (1 R. S., 738, § 140; *Mayor v. Mabie*, 13 N. Y., 151; *Burr v. Stanton*, 43 id., 462, 464; *Vandekar v. Vandekar*, 11 J. R., 122; *Churchward v. Queen*, L. R. [1 Q. B.], 173; *Hud. C. Co. v. Penn. Coal Co.*, 8 Wall., 276; *Maryland v. R. R. Co.*, 22 Wall., 105, 112; *Booth v. Cl. R. M. Co.*, 74 N. Y., 15; *McIntyre v. Belcher*, 14 C. B. [N. S.], 104; *Aspdin v. Austin*, 5 Q. B. [48 E. C. L.], 671; *Justice v. Lang*, 52 N. Y., 323.)

DANFORTH, J. There is no foundation for the appellants' argument. The parties to the agreement bound themselves by express covenants under "hand and seal," and the defendant is not shown to have broken any one of them. This conclusion was also reached by the trial court, and by the General Term, but the first rendered judgment for the plaintiff on the ground that, from the words of certain express covenants on the part of the lessor, an additional or correlative covenant on the defendant's part might be implied, and this may be so if the language used shows clearly that such covenant was intended. (*Sampson v. Easterly*, 9 B. & C., 505; *Saltoun v. Houstoun*, 1 Bing., 433; *Earl of Shrewsbury v. Gould*, 2 B. & Ald., 487.) But this construction cannot be permitted when it is apparent that the parties have

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themselves had the subject in mind and either one has withheld a promise in regard to it. That being so we can no more collect it from the words used than we can supply words, for in either case we should make the contract speak where the parties themselves were silent; and to do this the court has no power.

The agreement before us is very explicit. It was evidently prepared by a careful and experienced draftsman. Its subject is not new, nor is its form singular or unusual. It does not appear that anything was omitted which either party intended to provide for; "it is drawn technically in form, and with obvious attention to details," and in such a case "a covenant cannot be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended." (*Hudson Canal Co. v. Penn. Coal Co.*, 8 Wallace, 276.) This rule is cited with approbation by ALLEN, J., in the recent case of *Booth v. Cleveland Rolling Mill Co.* (74 N. Y., 15), and it applies to and must control the case before us.

We find in the agreement some covenants binding the parties mutually; others only the lessor, and others still the lessee,—expressed in apt words without ambiguity or confusion. There is first a lease. By it the plaintiffs' testator as lessor "doth grant, demise," etc., "to the party of the second part," the defendant, certain described premises "from 12 o'clock at noon of the 1st day of May, 1856, for the term of twenty-one years at the annual rent of \$1,600 payable quarterly;" then a mutual covenant expressed by the words—"it is agreed," that in case of non-payment of rent when due, or default in other covenants, the lessor may re-enter, etc.; next—the party of the second part, the lessee, "for himself, his successors or assigns, doth covenant to pay" to the lessor the yearly rent, also all taxes assessed, etc., on the demised premises during the term; then—"the party of the first part doth covenant and agree that on paying the rent and performing the covenants and agreements" in the lease "contained on the part of the party

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of the second part," he shall have quiet and peaceable possession of the premises during the term.

In all this there is no room for implication, and although from the word "demise" a covenant in law would be implied for quiet enjoyment, yet that covenant has been expressed. From the reservation of rent there is an implied covenant on the part of the lessee to pay the rent so reserved, yet a covenant to that end has been expressed; an omission to pay the rent, or a breach of any other covenant would warrant an entry by the lessor, yet it is mutually agreed that such shall be the effect of such omission. Not only then have technical words been used from which covenants in law would arise, *Hayes v. Bickerstaff*, (Vaughan's R., p. 118), but, as if to avoid the possibility of misconstruction, the covenants have also been written out. Following these provisions for a present lease, we find covenants in reference to a new or renewal lease, and on these the plaintiff rests his cause of action, viz. : "And the said parties of the first part do hereby covenant and agree that if the said party of the second part or his assigns shall well and truly pay the rent hereby reserved and keep and perform all the covenants herein contained on the part and behalf of the said party of the second part his successors or assigns, that the said Dorothea A. L. Wolfe" (party of the first part), "her heirs or assigns shall and will at the end or expiration of the term hereby granted, grant unto the said party of the second part a new lease of said premises for a further term of twenty-one years next ensuing from the time of the expiration of the term hereby granted, at such annual rent (not less than the rent hereby reserved) as shall then have been agreed upon by the parties or otherwise determined or ascertained as hereinafter provided." It is very plain that here is a covenant by the lessor only,—an agreement by her to give a new lease. There is none by the lessee to accept it. If we consider it in connection with the covenants which have preceded it, we see that it thus expresses the whole intention of the parties, for such is their language. It declares a covenant on the part of one to do an act. If it

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had been intended to bind both, or to impose a correlative obligation on the other, we should expect a clear statement to the effect, not only that one would give, but that the other would take a lease, or the use of words from which such an agreement must necessarily have been implied. It is not a present grant accepted by the other party, but a conditional promise or covenant to grant in the future a further term. It may be regarded as an offer for the benefit of the lessee, or as an inducement to him to build upon or improve the premises, giving assurance that if he did so he should enjoy the fruits of his expenditure for a longer period. (*Abeel v. Radcliff*, 13 J. R., 298.) This view is strengthened by the concession made in the printed points of the appellants' counsel. He says: "The circumstances of the lessee were peculiar, and the terms of the lease were exactly adapted to them and to the wants of the bank. * * * The bank was about to erect a costly banking-house upon this lot and its own adjoining lot on Fulton street." The lessee therefore would require the privilege of renewal,—the lessor be indifferent to it. If the term ended, the lot with the bank building would revert to the lessor. (*Piggot v. Mason*, 1 Paige, 412-415.) There is nothing to indicate that the lessor was desirous of continuing the lease, nor that the option was not given to the lessee to induce him to accept the original lease and improve the property. Besides, the lessor is bound to give a new lease if it was understood that the lessee was bound to accept; it would have been easier and more natural and in harmony with the structure of the other covenants regulating the engagements of the parties, to have entered at once into a lease for a longer period,—that this was not done would, of itself, warrant the conclusion that such result was not intended except at the option of the lessee. The learned counsel for the appellants, however, insists that the subsequent covenants relating to the adjustment of rent by appraisers bind both parties; and this is so to a certain extent. They bind the lessor provided the rent is fixed "at a sum not less" than that for the first term, and

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they bind the lessee absolutely. Here the option is with the lessor. He is not bound to accept a rent less than \$1,600. The lessee is bound, if he goes before the arbitrators to abide by and perform their award. But there can be no arbitration until the lessor is called upon to give a new or renewal lease. When this event happens it may be that both parties become bound, but it is not necessary to decide that question,—it is enough that there can be no arbitration if there is no acceptance of a new lease, and no obligation to accept it can be implied from the subsequent provisions, for we have seen that there is an express covenant concerning it, binding on the lessor alone and excluding the idea that the lessee is bound, and in such a case a covenant cannot be implied.

As we look further into the agreement we find other reasons for this construction of the covenants of the respective parties. There follows in substantially the same words as before, another covenant on the part of the lessor, for another, or second, renewal lease for twenty-one years, if the lessee pays his rent and performs his covenants, at such annual rent (not less than the rent reserved for the term of the first renewal) as shall have been agreed upon or otherwise determined as in the lease provided. Next—"it is further covenanted and agreed between the parties hereto, that at least ninety days previous to the last expiration of the last renewed or third term of twenty-one years, if said last term shall be granted," the demised premises shall be valued and appraised as a vacant lot by arbitrators "and the party of the second part shall purchase the lot at its appraised value," and "the said Dorothea A. L. Wolfe will, on receiving such appraised value, grant and convey to the party of the second part the said land in fee simple." There is nothing left for implication here; on the contrary there is a mutual covenant that the party of the second part will buy, and that the party of the first part will sell; so that we have throughout the instrument clearly and explicitly expressed the covenants and obligations of the several parties, and we may say of

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this contract as was said concerning a statute in *Edrich's Case*. "The several inditing and framing of the different branches doth argue that the maker did intend a difference of the purview remedies." *Edrich's Case* (pt. 5, fol. 118, 3 Coke's R.). From the different language used in the various covenants it is evident that the omission of words which would impose or indicate a mutual covenant was intentional, for it is apparent that the parties knew how to use terms applicable to the subject. It would therefore be a perversion of the plain reading of the agreement to impose upon the lessee the obligation which is assumed to lie at the foundation of this action, and it could only be done by a disregard of well settled principles of law. In *Churchward v. The Queen* (Law R. [1 Q. B.], 173), the court refused to interpolate the obligation sought to be implied, Lord Cockburn saying "the court should take great care not to make the contract speak where it was intentionally silent; and above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties;" and to the same effect *Hudson Canal Co. v. Penn. Coal Co.* (8 Wall., 276); *Maryland v. Railroad Co.* (22 id., 105); *Booth v. Cleveland Rolling Mill Co.* (74 N. Y., 15). A lease similar to the one in question came before the chancellor in 1829, and while the precise point now in hand was not presented, it is evident he regarded it optional with the lessee to renew. (*Piggot v. Mason*, 1 Paige, 412-415.) We have not overlooked the authorities referred to by the learned counsel for the appellant. They do not seem to us in point. In *Johnson v. Conger* (14 Abbott, 195), the action was for a renewal by the tenant against the landlord. The latter was clearly bound and upon sufficient consideration. The tenant elected to have the obligation fulfilled. Whether, except for that election, the lessee would have been bound, was not in question. In *Pordage v. Cole* (1 Williams' Saunders, 319 i), the decision rests on the word "agreed," which was said to be "the word of both parties," and so both were bound, but, say the court,

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“ it might be otherwise if the speciality had been the words of the defendant only and not the words of both parties.” In *Butler v. Thomson* (2 Otto, 412), the words were also the words of buyer and seller. Neither case has therefore any application to the present where the covenant is in terms the covenant of one only. Nor do those cases aid the appellants which hold that any words in a deed showing an agreement to do a thing make a covenant (Com. Dig. Covenant, A., 2; Vaughn’s R., 118; Rawle on Covenants, 365; Shepherd’s Touchstone, 162; 1 Platt on Leases, 706, and cases there cited; *Curry v. Stanley, Hayes & Jones*, 487) for the very point is against them in that, there are here no words to that effect. If the agreement was mutual throughout, the principle of these decisions and especially *Pordage v. Cole* would sustain the appellants and we could then hold with the learned judge at Special Term “ that what one party agreed to do, the other assented to and concurred in; ” but if the construction already given by us to the agreement is correct, such is not its character. It is very probable that both parties contemplated that the bank would find it desirable and for its interest to continue business upon the demised premises for a term longer than that of the original lease, and if so they would desire the “ right ” or “ privilege ” or “ option ” of a renewal, but we can find no express covenant or anything from which a covenant can be implied that they would remain or accept a renewal of the lease. We think, therefore, that the case was properly disposed of by the General Term and that its order should be affirmed, and judgment absolute ordered for the defendant.

All concur.

Order affirmed and judgment accordingly.

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HARRISON A. COWING, Respondent, v. ABRAHAM ALTMAN,
Appellant.

79	187
118	55
79	187
126	654
79	187
132	513

Where a defendant does not accept an allegation of fact in the complaint, but gives evidence upon the trial in conflict with it, plaintiff is not precluded on appeal from claiming the fact to be as the evidence establishes it.

So, also, where the case is tried without reference to the pleadings, and no exception is taken raising the question that plaintiff is precluded thereby from showing the actual transaction, the question cannot be raised upon appeal.

Neither the fact that a check was dishonored when transferred, or that presentment for payment has been delayed, discharges the drawer. If dishonored, any defense thereto against the payee will be available against his transferee; but no presumption arises that over-due or dishonored paper is invalid. If loss results to the drawer by delay in presentment, that is matter of defense.

After a party has been permitted to examine a witness at length in reference to a transaction, it is in the discretion of the court to exclude further examination upon the subject, and its decision is not reviewable here.

(Argued November 24, 1879; decided December 9, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict and affirming an order denying a motion for a new trial.

This action was brought upon a check dated March 8, 1871, drawn by defendant upon the Third National Bank of Buffalo, payable to the order of Edwin A. Holbrook. It is reported upon a former appeal in 71 N. Y., 435.

The defense was that the check was given in contravention of the provision of the bankrupt act (§ 45) prohibiting officers of courts of bankruptcy from taking anything other than the fees allowed by the act.

The proof was, in substance, that Holbrook, the payee, was appointed assignee of a bankrupt, he accepting the appointment under an agreement on the part of the creditors to pay him \$2,000 in addition to his fees. The firm, in which defendant was a partner, arranged with the creditors to buy up the

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claims against the bankrupt. One of the conditions was that said firm should pay the \$2,000. The check in suit was drawn for that purpose the day it bears date, and deposited with one Bowen to be delivered to Holbrook when he should be discharged as assignee. The check was delivered upon Holbrook's order to one Clark, May 2, 1872, and on that day it was delivered by him to the Marine Bank of Buffalo, to take up a note of the firm of Clark & Hazzard, which was delivered up on receipt of the check.

The further facts appear in the opinion.

William H. Gurney, for appellant. It was error to permit plaintiff to recover on facts not embraced within the issues, and in direct contradiction of his own complaint. (*Wright v. Delafield*, 25 N. Y., 366-369; *Ferguson v. Ferguson*, 2 Com., 360; *Kelsey v. Western*, 2 id., 500; *Baily v. Rider*, 6 Seld., 663; *Rome Ecch. Bk. v. Eames*, 1 Keyes, 588; *Ryder v. Jenny*, 2 Roberts, 56; *McKinley v. Morris*, 21 How.* [U. S.], 343, 348; New Code, § 522; *Paige v. Willett*, 38 N. Y., 28; *Thorp v. Keokuk Coal Co.*, 48 id., 253.)

Sherman S. Rogers, for respondent.

Per Curiam. Upon the former appeal in this case (71 N. Y., 435), it was held that, upon the facts there appearing, the check did not have an inception until the 3rd of May, 1872, when it was delivered by the depositary to Holbrook, the payee, and that the Marine Bank became a *bona fide* holder of the check by the transfer from Clark & Hazzard in payment of a note held by the bank against that firm, and was entitled to enforce the check notwithstanding the illegality of the consideration between the original parties.

The facts shown on the last trial bearing upon the principal point determined, were substantially the same as upon the former trial, and the case in this respect is governed by our former decision.

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It is now claimed that the plaintiff is precluded from claiming that the check was not transferred to Holbrook until the 3rd of May, 1872, by the allegation in the complaint which after stating the making of the check on the 8th of March, 1871, alleges that the "defendant thereupon subscribed the draft or check and delivered it to said Holbrook."

There are several answers to this position. In the first place, the defendant on the trial gave evidence tending to show that the check was obtained by Holbrook on the 3d of May, 1872, from the depositary with whom it was left, to be delivered on Holbrook's obtaining his discharge as assignee. The defendant did not accept the statement in the complaint as to the time when Holbrook received the check, but gave proof to establish affirmatively that it was delivered to him on the 3d of May, 1872. In the second place, the case was tried upon the merits without reference to the pleadings and no exception was taken, raising the question that the plaintiff was concluded by the pleadings from showing the actual transaction, and that Holbrook did not acquire title to the check until its delivery to him by the depositary.

Some other points are made which will be briefly considered. 1st. The plaintiff after proving the signature and indorsement of the check and presentment, demand and notice on the 3d of May, 1872, rested. The defendant thereupon moved for a nonsuit on the ground that the check was presumptively dishonored when received by the plaintiff, and on the further ground that the drawer was discharged by the delay in presentment. Neither ground was tenable or justified a motion for nonsuit. No defense to the check had been shown, and neither the fact that the check was dishonored when the plaintiff received it, nor that presentment had been delayed, discharged the drawer. If the check was dishonored when it was transferred by Holbrook any defense thereto in his hands would be available against his transferee, but no presumption arises that over-due or dishonored paper is invalid. And it is a sufficient answer to

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the other ground upon which the motion was made that if loss resulted to the defendant from delay in presentment, this was matter of defense.

2nd. The court permitted the defendant to inquire at length, on the examination of the witness Janes, a former plaintiff, in respect to the circumstances under which he took the check, the consideration which he gave and his pecuniary condition, and after a lengthy examination upon these points, interposed and excluded further examination of the witness upon the subject. This was a matter in the sound discretion of the court which cannot be reviewed here.

3rd. The exception to the offer to show by the witness Locke what Holbrook suggested to him as to the transfer of the note was not well taken. The communication, if it could be deemed of any importance, was made by Holbrook to the witness while the latter was acting as his counsel and was confidential. Moreover it subsequently appeared on his examination that the transfer was not made at Holbrook's suggestion. The fact that the witness had communication with Holbrook, in respect to the litigation fairly appeared from the evidence given. What Holbrook said to his counsel was inadmissible.

We think no error was committed on the trial, and the judgment should be affirmed.

All concur.

Judgment affirmed.

GEORGE METZGER et al., Respondents, v. THE ATTICA AND
ARCADE RAILROAD COMPANY, Appellant.

79	171
108	509
79	171
181	78

Where the bonds of a town have been issued to a railroad corporation, in payment for stock, by commissioners appointed under and by a judgment, void for want of jurisdiction, rendered in proceedings under the act authorizing "municipal corporations to aid in the construction of railroads" (chap. 907, Laws of 1869), an equitable action is maintainable, under the act of 1872, for the protection of tax-payers, etc. (chap. 161, Laws of 1872), at the suit of a tax-payer of the town, to restrain the negotiation or payment of the bonds, and to compel their cancellation.

(Argued November 24, 1879; decided December 9, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought by plaintiffs, as tax-payers of the town of Sheldon, Wyoming county, to restrain defendant, the Attica and Arcade Railroad Company, from negotiating certain bonds of the town, issued to it by defendants, Parker and others, as commissioners, appointed for that purpose, by a judgment or decision of the court in proceedings under the act authorizing municipal corporations to aid in the construction of railroads (chap. 907, Laws of 1869); also to have the said bonds declared void, and directed to be canceled; and to restrain defendant Kuster, the collector of said town, from paying over to the railroad company moneys in hand collected to pay interest coupons upon said bonds.

The referee found that the petition was insufficient to give the court jurisdiction in said proceedings, and that, therefore, the judgment therein, and the bonds issued in pursuance thereof were void; and directed judgment, requiring the railroad company to cancel and surrender the bonds and coupons, that the commissioners surrender the certificates of stock in their possession to be canceled, and that the moneys in the

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hands of the collector be paid to the supervisor of the town for its use.

George Bowen, for appellant. The bonds in suit having been issued in proceedings void for want of jurisdiction, an equitable action for their cancellation cannot be maintained. (*People v. Smith*, 55 N. Y., 135; *Starin v. Genoa*, 23 id., 439; *People v. Mead*, 24 id., 114; S. C., 36 id., 224; *Town of Venice v. Woodruff*, 62 id., 465; *Town of S'pport v. Teutonia S. B'k*, MSS. opin., Ct. of App.; Laws of 1869, chap. 907, § 4; Laws of 1871, chap. 925, § 6; Story's Eq. Jur., § 700, *a.*; *Heywood v. City of Buffalo*, 14 N. Y., 542.) The money raised for the purpose of paying the interest on the bonds having been paid voluntarily by the tax-payers cannot be recovered back. (*People v. Brown*, 55 N. Y., 180; *Ross v. Curtiss*, 31 id., 606; *First Nat. B'k v. Wheeler*, 72 id., 201-206.)

Thomas Corlett and H. A. Comstock, for respondents. The judgment under which the bonds were issued being void upon its face did not conclude anybody. (*Bloom v. Burdick*, 1 Hill, 141; *Dicks v. Hatch*, 10 Iowa, 380; *Townsend v. Jeffries*, 17 Ala., 276; *Reed v. Wright*, 2 Greene [Ja.], 15; *Dobson v. Price*, 12 N. Y., 164; *Galpin v. Page*, 18 Wall., 350; *Sears v. Terry*, 26 Conn., 273; *Galpin v. Page*, 1 Am. L. T. R. [N. S.], 523; *Canal Bk. v. Judson*, 8 N. Y., 254; *Harrington v. People*, 6 Barb., 607; *Camden v. Mulford*, 2 Dutch., 49; *Elliott v. Pearsoll*, 1 Pet., 350; *Schneider v. McFarland*, 2 N. Y., 459; *Corwin v. Merritt*, 3 Barb., 341; *Bloom v. Burdick*, 1 Hill, 130; *Wood v. McChesney*, 40 Barb., 417; *Chandler v. Northrop*, 24 id., 129; *Forbes v. Halsey*, 26 N. Y., 63; *Staples v. Fairchild*, 3 id., 41; *Van Alstyne v. Erwin*, 11 id., 331; *Decker v. Bryant*, 7 Barb., 182; *Stanton v. Ellis*, 12 N. Y., 575; *Hale v. Sweet*, 40 id., 97; *Ely v. Cook*, 28 id., 365; *Morrow v. Freeman*, 61 id., 515.) This is a proper case for a bill in equity to compel the surrender of the bonds and coupons, and also to restrain the defendant,

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the collector of the town, from paying over to the alleged commissioners the money raised by the board of supervisors to pay interest on the bonds. (*Boyce's Ex'rs v. Grundy*, 3 Pet., 210; *Watson v. Sutherland*, 5 Wall., 74; Story's Eq. Juris., § 694; *Reed v. Bk. of Newburgh*, 1 Paige, 215; *Hamilton v. Cummings*, 1 J. Chy., 517; *McHenry v. Hazzard*, 45 N. Y., 580; *Whitingham v. Thornburg*, 1 Vt., 206; *De Costa v. Scandrel*, 2 P. Wms., 170; *Peak v. Highfield*, 1 Russ., 559; Story's Eq. Juris., § 64, K.; *Biddle v. Ramsey*, 52 Mo., 153.) The right of the plaintiffs, as taxpayers of the town of Sheldon, to maintain this action is abundantly settled by authority. (*Ayres v. Laurence*, 59 N. Y., 192; *Hurlburt v. Banks*, 1 Abb. N. C., 157; *Newton v. Keesh*, 9 Hun, 355; *Falconer v. R. R. Co.*, 7 id., 499; S. C. on appeal, 69 N. Y., 491.)

DANFORTH, J. The defendant now concedes the bonds in question to have been issued under a judgment void for want of jurisdiction in the court which rendered it, and claims moreover that they are void for matters appearing upon their face. To this extent, then, there is acquiescence in the decision of the learned referee, but the appellant contends that for these very reasons there is no ground for equitable interference, and this might be so if the question turned upon the exercise of the general jurisdiction of a court of equity, (Story Eq. Jur., § 700; *Heywood v. City of Buffalo*, 14 N. Y., 542), but it does not. The plaintiffs are tax-payers and the defendants, Parker, Briggs and White, claim to be commissioners of the town of Sheldon under color of the judgment above referred to and an appointment by virtue of proceedings under the act permitting "municipal corporations to aid in the construction of railroads." (Laws of 1869, chap. 907.) They have issued to the appellant bonds purporting to be the obligations of the town and which, if valid, would be a charge "upon the real and personal estate within the limits thereof, to be collected and paid in like manner as other debts, obligations and charges against the" town.

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(Chap. 907, *supra*, § 6; Laws of 1870, chap. 300, § 1.) The bonds and the coupons attached could therefore be collected by assessment, and no action would be necessary to enforce their payment. This action is predicated upon the provisions of the act entitled: "An act for the protection of tax-payers against the frauds, embezzlements and wrongful acts of public officers and agents." (Laws of 1872, vol. 1, chap. 161.) The intent and scope of this statute was, soon after its enactment, carefully considered by this court, in *Ayers v. Lawrence* (59 N. Y., 192), and it is very clear that the plaintiffs have brought their case within its provisions as they were then construed. The appellants are the holders of the bonds and coupons illegally issued, and to apply the money already raised to their payment or permit the bonds themselves to remain an apparent pledge of the credit of the town, and a lien upon the property of the tax-payer, would sanction the very waste and injury which the statute was designed to prevent. The action was, therefore, well brought. The commissioners do not appeal, and as the railroad company has no interest in the litigation save as holder of bonds pronounced invalid, it can have no concern as to the disposition of the money now in the hands of the collector.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

SARAH J. ULINE, Appellant and Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant and Respondent.

79	175
d168	1138

It seems, that while a judge, in settling interrogatories to be annexed to a commission to take testimony, is required to allow "any question pertinent to the issue" (Code of Civil Procedure, § 892), he has authority to disallow questions not pertinent, and hence to determine whether a question is pertinent or not.

The power to exclude questions, however, should be sparingly exercised. The judge in such case has not the discretion which the court has on trial as to the extent to which he will permit a cross-examination, for the purpose of merely testing the credit of the witness, and upon matters collateral to the main issue; he must insert all pertinent questions. The decision of the judge in settling the interrogatories is an order (Code, § 767); if it disallows a pertinent question, it affects a substantial right; and is therefore appealable. (Code, §§ 1347, 1348.)

As to whether the party has a remedy in such case by mandamus, to compel the allowance of the question, *quære*.

An appeal does not lie from an order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial. (Code, § 911.)

In an action to recover damages for injuries alleged to have resulted from defendant's negligence, a release was set up as a defense; this the plaintiff claimed was a forgery. A commission was issued on behalf of defendant, to take the testimony of the person who plaintiff alleged forged the release, as to the alleged settlement. Plaintiff after a cross-interrogatory calling for the salary paid to the witness, proposed others, asking the amount of the witness' expenses per annum, whether he left the place by day or night, by whom he was accompanied, and where he stopped; also, as to the amount of the debts he left unpaid; whether before he left he purchased an India shawl, and at what price, and whether he borrowed money of certain persons specified. These cross-interrogatories were disallowed; *held* error.

(Argued November 25, 1879; decided December 9, 1879)

THESE were cross-appeals from an order of General Term of the Supreme Court, in the third judicial department, affirming in part, and reversing in part, a decision of a judge upon settlement of interrogatories, to be annexed to a commission herein; also appeal by defendant from order of said General Term, denying a motion to dismiss the appeal from the order settling the interrogatories.

Statement of case.

This action was brought to recover damages for injuries to real estate, alleged to have been occasioned by defendant's negligence. One of the defenses was that defendant settled with the mother of plaintiff, who was the owner of the premises, at the time of the alleged injuries, and received from said owner a written release of said damages. This release, plaintiff claimed, was forged by one De Pfuhl, who was, at the time, a clerk in defendant's office, in Albany, and who, subsequently, left that city and went to Chicago. A commission was issued, on behalf of defendant, to take the testimony of said De Pfuhl. The interrogatories were as to the settlement, and the execution of the release. Plaintiff proposed the following cross-interrogatories, among others :

"Second. When did you commence serving in the office of the defendant, in the city of Albany, and when did you leave that employment? Give the dates, respectively? What was your salary when in such employment at the commencement and what was it at the end of such service, and what changes in your salary were made during such service and at what dates?

"Third. Had you a family when in the employ of the defendant, and if so of whom did it consist? Give their names and ages, respectively, and then state at what street and number, or streets and numbers, in the city of Albany, or elsewhere you resided while in the service of the defendant in the defendant's office, in Albany?

"Fourth. State, as near as you can, what was the amount of your family and personal expenses, per annum, during each year that you resided in the city of Albany?

"Sixth. Did you leave Albany at the end of said service during the day-time or during the night-time, and by what train and at what hour and on what railroad or in what conveyance, and did any person accompany you, and if so who? Give his, or her name, or names, and how far were you accompanied by such person or persons, and state whether you stopped over at any places on your way, and if so give the names of such places and of the hotel or hotels you stopped at, with the date or dates when you were there?

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“ Eighth. If you have answered that you left debts unpaid when you left Albany, state the names of your creditors and the several amounts due to each at that time, and state particularly the amount of your indebtedness to John M. Crapo, and whether, before you left, you purchased from him an India shawl and at what price, and state the date of such purchase as nearly as you can; did you borrow money before leaving Albany from Charles T. Titus, William Lush, Charles H. Fisher, Nicholas Engel or Charles Engel, and how much from each, and how much from other persons, naming each.

“ Ninth. Have you ever been arrested or imprisoned in this country, and if so, how many times and when and where, and for what alleged offenses or crimes? Have you been recently arrested and imprisoned on a charge of larceny or some other offense in the city of Chicago; and if so, state when you were imprisoned and who made the complaint against you, and whether you are now under bonds to appear to answer the charge. State also, particularly, whether you have recently been arrested at Chicago on complaint made by a Mr. Delaneau, on a charge of larceny and on a charge of obtaining money under false pretenses on complaint of Mrs. Mitchell? And state, also, whether you have restored to Mr. Delaneau any of the property alleged to have been taken, or to Mrs. Mitchell any of the money alleged to have been obtained, or paid them or either of them for the same.”

Upon settlement of the interrogatories the judge disallowed the fourth, sixth, eighth and ninth interrogatories, and an order was entered to that effect. The General Term on appeal affirmed the order as to the fourth, sixth and eighth cross-interrogatories, and reversed it as to the ninth.

Amasa J. Parker, for plaintiff. The proper time to exclude a question, on the ground that it is not competent or relevant, is when it is proposed to read the deposition in evidence at the trial. It cannot be done on the settling of the interrogatories. (Code of Civil Procedure, § 911; 2 R.

Statement of case.

S. [6th ed.], vol. 3, 656, § 23; *Ocean Ins. Co. v. Francis*, 2 Wend., 65; 4 M. & Selw., 502; Revisers' Notes, 3 R. S., 735 [2d ed.].) The officer settling the interrogatories has no power or authority to reject an interrogatory, because it is leading, the party being allowed to make this objection on the trial. (2 Wait's Pr., 696; *Fleming v. Hallenbeck*, 7 Barb., 271; *Williams v. Eldredge*, 1 Hill, 249; 2 R. S. [5th ed.], vol. 3, 394, § 15, 675.) It was competent to ask the witness whether he had been arrested and imprisoned, and for what alleged offenses. (*Real v. People*, 42 N. Y., 270; *Brandon v. People*, 42 id., 265; *Connor's Case*, 50 id., 240; 8 Hun, 562.) The order was appealable. (Code of Civil Procedure, §§ 1347, 1348.) By section fifty of the Code of Procedure any party affected by an order may enter it with the clerk to enable the party to appeal under section forty-nine. (*Nicholson v. Demham*, 1 Code R., 119; *Savage v. Relyea*, 3 How. Pr., 276; *Hunt v. Wallis*, 6 Paige, 371; *Whitney v. Be'den*, 4 id., 140; 4 Wait's Pr., 606.) A motion to set aside any proceeding for irregularity must be made promptly and before the moving party takes any other step in the cause. (*Lord v. Graydon*, 14 Alb. R. R., 444; *Persse v. Brooks*, id., 119; *Strong v. Strong*, 1 Abb. [N. S.], 242; 4 Wait's Pr., 634-635; *Mayer v. Lyons*, 2 How. Pr., 280; 1 Daly, 297.) If plaintiff was irregular in entering the order, the defendant's remedy is not to move to dismiss the appeal, but it would be to move at Special Term to set the order aside. (*Bedell v. Powell*, 3 Code R., 61; *Keley v. Thayer*, 34 How., 163; 4 Wait's Pr., 236.)

Samuel Hand, for defendant. The interrogatories to be annexed to a commission, if not settled by consent, must be settled by a judge of the court or a county judge. (Code Civil Procedure, § 891.) It is the duty of the judge to allow either party to insert therein any question pertinent to the issue, which he proposes. (Code Civil Procedure, § 892.) The question asked the witness on cross-examination as to how many times he had been arrested or

imprisoned, and as to offenses with which he had been charged, was incompetent. (*Brown v. People*, 8 Hun, 562; *Jackson v. Osborn*, 2 Wend., 555; *Lipe v. Eisenlerd*, 32 N. Y., 229, 238; *People v. Brown*, 72 id., 571.) All these questions on cross-examination were in the discretion of the judge. (*Gt. W. R. Co. v. Loomis*, 32 N. Y., 127; *King v. N. Y. C. R. R. Co.*, 72 id., 607.)

EARL, J. Precisely what the powers of a judge in settling interrogatories to be annexed to a commission are, has not been much considered in reported cases. It is provided in the Code, as it was in the Revised Statutes, that the interrogatories are to be settled by a judge upon notice. (§§ 891, 892.) I believe it has been generally understood that the judge has some power to determine what interrogatories may be annexed to the commission, and the form of them. If he has not such power, then the requirement that the interrogatories "must be settled" has little or no significance; and if he has no power to decide anything, there certainly can be no reason for troubling him about the matter. (*MacDonald v. Garrison*, 9 Abb. Pr., 178.)

The statute provides that either party must be allowed to insert "any question, pertinent to the issue, which he proposes." That right the judge cannot deny or curtail. Every such question he must allow. But he must have authority to disallow questions not pertinent to the issue, and hence to determine whether a proposed question is pertinent or not. But as he cannot always foresee precisely what evidence the exigencies of the trial may render proper, and as the statute reserves the right to either party to make at the trial any objection to questions or answers which he could make if the witnesses were testifying there orally, the power to exclude questions should be sparingly exercised. But if questions clearly impertinent or incompetent or immaterial are proposed, he should refuse to allow them; otherwise the appearance of the parties before him would be an idle ceremony.

The Code provides that either party may insert any question "pertinent to the issue." The Revised Statutes provided that either party might insert any question "pertinent to the cause." (2 R. S., 394.) Both phrases clearly have the same meaning. It was undoubtedly intended that either party should have the right to put every question to a witness by commission which he could put to the witness if he were examined orally at the trial.

The question upon plaintiff's appeal is whether the judge erred in disallowing the fourth, sixth and eighth cross-interrogatories.

The action is to recover certain damages. The defense is that the defendant had settled for the damages, by the payment of \$500, and obtained a written release. The plaintiff claims that the release is a forgery, and that the forgery was committed by the witness to be examined, and that if the defendant paid the money, it was taken and kept by the witness. The character and credit of the witness are, therefore, of great importance, and competent evidence, showing what they are, quite material. Questions may, therefore, be put to him, upon his cross-examination, tending to discredit or disgrace him generally; and he may also be questioned as to his conduct and acts about the time of the alleged forgery, with the view of showing his guilt. Such evidence need not be of a conclusive nature. It is competent if it throws light upon the principal fact to be proved, and if, with other evidence, it would tend to prove that fact.

Suppose it could be shown by the cross-examination of this witness that, at the time of the date of the alleged release he was living upon his salary, and that his family expenses were as much as his salary, or more; that immediately after this transaction he quit the service of the defendant and left Albany in the night time, leaving his family behind him; that he left alone, or in disreputable company; that upon his route to his destination he traveled and behaved in a suspicious or discreditable manner; that just before leaving,

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and in close proximity to this transaction, he created debts, by borrowing money or otherwise, for the purpose of filling his pockets before his departure; that he purchased for his wife an India shawl for just \$500, or near that sum, having no honest means wherewith to make the purchase; would not questions to elicit such facts be competent? I think they would; and such facts might have been elicited by these cross questions. The questions were, therefore, pertinent; and being so, the judge could not rightfully exclude them. It was not for him to determine that the questions might not elicit the facts sought, or that the facts would not be very important if elicited. The plaintiff had the statutory right to the questions.

It is true that a judge at the trial generally has a discretion as to the extent to which he will permit a cross-examination, for the purpose of merely testing the credit of a witness, and upon matters collateral to the main issue on trial, to be carried; and the exercise of such discretion, unless clearly abused, will not be interfered with by a court sitting in review of the trial. That is a discretion to be exercised by the judge presiding at the trial; and in exercising it, he has before him, for his guidance, the appearance of the witness, if orally examined, the evidence he has given upon his direct examination, and all the facts of the case as they then appear; and he is thus able to judge whether a further cross-examination will aid the ends of justice. But a judge in settling interrogatories has no such discretion. He cannot tell what the exigencies of the trial may be, and he cannot determine how far a cross-examination may be required to be carried, nor precisely what facts will become important. He must, therefore, insert all pertinent questions, although a judge sitting at the trial might, in the exercise of his discretion, there exclude them.

But it is claimed by the learned counsel for the defendant that the plaintiff's remedy, if any, for the exclusion of his questions was by mandamus to compel their allowance, and not by appeal to the General Term. Without denying that

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the plaintiff⁴ might have a remedy by mandamus, I have no doubt that he could appeal.

The decision of the judge in settling the interrogatories was required to be in writing and such decision is an order in the action. (Code, § 767.) In this case, an order was drawn up satisfactory to the attorney for both parties and was by consent entered in the clerk's office. So far as it disallowed plaintiff's pertinent questions, it affected a substantial right and was, therefore, appealable under sections 1347 and 1348 of the Code.

The General Term did not err in deciding that the ninth cross question should be annexed to the commission. Such questions have frequently been decided competent. An appeal, however, should not be allowed because an improper question has been ordered to be annexed to a commission; because it affects no substantial right, as the party can make the objection at the trial and be fully protected there.

Briefly, to some extent, restating my views, I say if the judge, in settling interrogatories to be annexed to a commission, disallows a pertinent question, he commits an error which will be corrected upon appeal, unless it can be seen that the error can do no harm to the party who complains of it. If he allows an improper question, there is no right of appeal, as such allowance does no substantial harm, the party objecting to the question being able to protect himself at the trial by objections there made.

The order of the General Term, so far as the defendant has appealed therefrom, must be affirmed, without costs to either party upon the appeal to this court, and so far as the plaintiff has appealed therefrom, must be reversed; and the fourth, sixth and eighth cross-interrogatories must be allowed and annexed to the commission; and upon her appeal, the plaintiff must recover costs of the defendant.

All concur.

Ordered accordingly.*

* The remittitur was upon subsequent motion amended so as to give plaintiff costs against the defendant on her appeal to the General Term and to this court.

Statement of case.

STEPHEN D. STEPHENS, Respondent, v. THE BOARD OF
EDUCATION OF THE CITY OF BROOKLYN, Appellant.

One G., who was a member of the board, defendant herein, as attorney for it received \$3,600.84 of its money, which he wrongfully appropriated to his own use; he subsequently procured from plaintiff on a forged mortgage \$4,129.34, which he deposited in a bank to his credit, and on the same day drew his check on said bank to defendant's order for the amount so appropriated, and delivered the same to defendant, who received it, without notice or knowledge of the fraud perpetrated upon plaintiff, and gave G. credit therefor; the check was paid and the money received thereon used by defendant.

In an action to recover the amount so received by defendant from G., *held*, that defendant having received the money in good faith, and in the ordinary course of business, for a valuable consideration, was not liable.

The possession of money vests the title in the holder, as to third persons dealing with him and receiving it in due course of business and in good faith, upon a consideration good as between the parties.

The doctrine, that an antecedent debt is not such a consideration as will cut off the equities of third parties, in respect to negotiable securities obtained by fraud, has no application to money so obtained.

Caussidiere v. Beers (2 Keyes, 198), distinguished.

It seems, that while the money remained on deposit in the bank, plaintiff could have compelled the bank to restore it, but having paid it out, without notice of any defect in the title of G., it was thereafter protected.

(Argued November 25, 1879; decided December 9, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, in favor of plaintiff, entered upon an order overruling exceptions and directing judgment upon a verdict.

This action was brought to recover moneys alleged to have been received by defendant belonging to plaintiff.

The facts appear sufficiently in the opinion.

Winchester Britton, for appellant. Defendant being a creditor of Gill, and the bank a debtor, it was entirely competent for Gill to check on his balance created by despositing plaintiff's check to pay defendant a just debt, which he did.

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133	103

79	188
139	456

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141	385

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147	191

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159	460

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The question whether, had he left the money in bank, plaintiff could have recovered from the bank, does not arise here. (*Matter of Franklin Bk.*, 1 Paige, 243; *Commercial Bk. v. Hughes*, 17 Wend., 94; *Graves v. Dudley*, 20 N. Y., 76; *Marsh v. Oneida Bk.*, 34 Barb., 298; *Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y., 82; *Van Allen v. Am. Nat. Bk.*, 52 id., 8.) The fact that without the money obtained from plaintiff, Gill's account would have been insufficient to have paid defendant, does not change the principle or legal effect of the transaction. When the identity of the money is lost, the ability to follow it ceases. (*Kip v. Bk of New York*, 10 J. R., 63-65; *Loundes v. Anderson*, 13 East, 130.) A payee of money in due course of business is not to be put upon inquiry, at his peril, as to the manner in which said money was procured by the payer. (*Justh v. Nat. Bk. Comm.*, 56 N. Y., 484; *Mason v. Waite*, 17 Mass., 563; *Clark v. Shee*, Cowp., 197; *Nettle v. Harding*, 6 W., H. & G., 349; *Warren v. Haight*, 65 N. Y., 171-178; *Newtown v. Porter*, id., 133; *Reed v. Bk. Newburgh*, 6 Paige, 337; *Currie v. Misa*, 12 Moak, 605, 606; *Watson v. Russell*, 31 L. J. [Q. B.], 304; *Rapelje v. Emery*, 2 Dallas, 51, 54; Cowper's R., 200.) Where money comes illegally or *mala fide* into the hands of a party, it may be followed by the true owner. (*Clark v. Shee*, Cowp., 197; *Neale v. Harding*, 6 W., H. & G., 349; *Justh v. Nat. Bk. Comm.*, 56 N. Y., 484; *Meech v. Stover*, 19 id., 26; *Caussidiere v. Beers*, 2 Keyes, 198; Stephen's Nisi Prius, 355; *Smith v. Bromley*, 9 Doug., 607.)

Alonzo C. Farnham, for respondent. The money of the plaintiff having been virtually stolen from him, he could not be deprived of his title thereto, unless as against an innocent party, giving at the time a valuable consideration therefor. (*Caussidiere v. Beers*, 2 Keyes, 198; *U. S. v. State Nat. Bk. Boston*, 6 Otto [U. S.], 30; *Brower v. Peabody*, 2 Kern., 121; *Bayne v. U. S.*, 93 U. S. R., 642; *Wilson v. Smith*, 3 How. [U. S.], 763; *Bk. Metropolis v. N. E. Bk.*,

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6 id., 212.) The defendant is not a *bona fide* holder of the money, having received it in payment of a precedent debt; and Gill having no title to the money, the plaintiff could recover it, either from him or his assignee. The assignment or transfer to the defendant did not cut off the plaintiff's equities, there being no new consideration therefor. (*Wood v. Robinson*, 22 N. Y., 564.) Defendant not being a *bona fide* holder, as against the prior equity of the plaintiff, there is an implied privity of contract between the parties. (*Rapelje v. Emery*, 2 Dall., 51, 54; *McDougal v. Walling*, 48 Barb., 364; *Pierce v. Crafts*, 12 J. R., 90, 94.) Negligence upon the part of one who, by mistake, pays to another a sum of money, to which the latter is not entitled, does not defeat the right of action of the former to recover back the money so paid. (*Lawrence v. Am. Nat. Bk.*, 54 N. Y., 432; *Duncon v. Berlin*, 46 id., 685; 55 id., 213.)

ANDREWS, J. There is no dispute as to the material facts. On and prior to the 18th of December, 1871, one Gill was a member of the board of education of the city of Brooklyn, and, as attorney for said board, received \$3,600.84, the money of the board, which he wrongfully converted and appropriated to his own use. Soon after the date mentioned, he procured from the plaintiff on a mortgage forged by him on the property of a third person \$4,129.34 in a check of the plaintiff which on the 21st of December, 1871, he deposited in a bank, to his credit, and on the same day drew his own check on the bank in which the deposit was made, to the order of the board of education for the amount of the money fraudulently appropriated by him and delivered the same to the board, and the board thereupon credited the check to Gill in discharge of his debt. The check was paid in due course, and the money received thereon was used by the board in its business. The plaintiff, about two months thereafter, ascertained that the mortgage received from Gill was a forgery, and then demanded from the defendant the money received from Gill. The defendant had no notice, when it

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received the check from Gill, of the fraud by which he obtained the money of the plaintiff, nor had it any information as to the source from which the money to his credit in the bank was derived. The first information which the defendant had of the facts in respect thereto was at the time of the demand made by the plaintiff, before referred to.

The question is presented whether, under these circumstances, the plaintiff can maintain an action to recover the money received by the defendant from Gill and applied in payment of the debt owing by him to the defendant. We are of opinion that the action will not lie. The money having been obtained by Gill from the plaintiff by fraud and felony the former acquired no title thereto and the plaintiff could recover it from Gill if found in his possession, or he could follow it into the hands of any person who received it from Gill without consideration or with notice of the fraud by which he obtained it. The money when deposited by Gill in the bank, was still the money of the plaintiff. The bank was a mere depository and while it so remained, the plaintiff could have compelled the bank to restore the money to him as the rightful owner. (*Tradesmans' Bk. v. Merritt*, 1 Paige, 302; *Mechanics' Bk. v. Levy*, 3 id., 606; *Pennell v. Deffell*, 4 De Gex, M. & G., 372.) But the bank, having paid it out on the check of Gill without notice of any defect in his title, was thereafter protected against any claim of the plaintiff therefor. The plaintiff, however, passing by the bank to whose possession the money first came from Gill, claims to recover of the defendant on the ground that the defendant, having received it from Gill in payment of an antecedent debt, cannot be permitted to retain it as against the plaintiff. No authority has been cited which sustains this position. The rule has been settled by a long line of cases, that money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it *bona fide* and for a valuable consideration in due course of business. This, said Lord HOLT in 1 Salk., 126, is "by reason of the course of trade which creates a property in the

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assignee or bearer"—and in *Miller v. Race* (4 Burr., 452), Lord MANSFIELD said: "The true reason is upon account of the currency of it; it cannot be recovered after it has passed into currency." No suspicion is cast upon the *bona fides* of the defendant. It received the money in the ordinary course of business, and for a good and valid consideration. The defendant had no connection with the fraud of Gill. He did not act or assume to act as the defendant's agent in the transaction with the plaintiff. The money was not obtained through or by means of his relation to the defendant. The position and rights of the parties are precisely the same as if Gill had not been a member of the board when the payment was made, or as if the debt which he paid had not originated in any violation of trust. It is said that the case is to be governed by the doctrine established in this State that an antecedent debt is not such a consideration as will cut off the equities of third parties in respect of negotiable securities obtained by fraud. But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no ear-mark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good

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faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world. "Money," said Lord MANSFIELD, in *Miller v. Race*, before cited; "shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business." The question involved in this case was considered by JOHNSON, J., in *Justh v. Bank of Commonwealth* (56 N. Y., 478), and he says: "In the absence of trust or agency I take the rule to be that it is only to the extent of the interest remaining in the party committing the fraud that money can be followed as against an innocent party having a lawful title founded upon consideration; and that if it has been paid in the ordinary course of business, either upon a new consideration or for an existing debt, the right of the party to follow the money is gone." The case perhaps did not call for a decision upon the point whether an existing debt was a sufficient consideration to uphold a title to money fraudulently obtained by a debtor, and by him paid to his creditor, as against the defrauded party; but we think it correctly declares the rule of law upon the subject. The case of *Caussidiere v. Beers* (2 Keyes, 198), is entirely consistent with the rule here declared. The defendant in that case had no right to the money either against the agent from whom he obtained it or the principal to whom it belonged. The judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.

Statement of case.

THE PEOPLE ex rel. ORRIN W. SAGE, Appellant, v. GEORGE W. SCHUYLER, Auditor, etc., Respondent.

Where an appropriation, within the power of the Legislature, is made by it, no inquiry is admissible as to the reasons, or information upon which it acted.

Where a work of public necessity is done under an invalid contract, or even voluntarily, without the authority of any public officer, and the Legislature appropriates money to pay for it, a disbursing officer cannot refuse to apply the money to the purpose for which it was appropriated, on the ground that the State was not originally under any legal obligations to make payment, or that the Legislature was not sufficiently informed of the facts; the only question for such officer is whether the appropriation was for the purpose claimed; when this is ascertained his duty is ministerial only.

The canal commissioners having entered into a contract with M. to do certain work, which was of public necessity, and M. having refused to go on with the work because of the refusal of the canal auditor to audit and allow certificates of the commissioners, on the ground that there was no unexpended appropriation to pay them, the relator, at the request of the commissioners, for the purpose of expediting the work, advanced the money required to complete it, in reliance upon a future appropriation by the Legislature, and the certificates were assigned to him. The acts of the commissioners in respect to the work were communicated to the Legislature, from time to time, in the official reports of the commissioners, which stated the amounts expended and the purposes of the expenditure in accordance with the facts. In 1875 a budget was made up in the auditor's office of out-standing certificates, issued for work done on the canal, and furnished to the Legislature when engaged in making an appropriation to pay the same; in which budget the certificates so held by relator were specifically described and included, and an appropriation was made to the precise amount of the budget (§ 1, chap. 263, Laws of 1875). In proceedings to compel the auditor by mandamus to draw his warrant for the amount of the certificates; *held*, that the facts authorized a finding, that the act making an appropriation was passed with full knowledge on the part of the Legislature, and with the intent to provide specifically for the payment of said certificates; that the fact that the appropriation was made for this purpose having been established, the question of ratification or knowledge of the Legislature of the facts relating to the contract, and of the validity of the contract were unimportant; and that the relator was entitled to the relief sought. Also *held*, that said appropriation was not repealed by the repealing clause in the act of 1876 (§ 1, chap. 423, Laws of 1876), providing "for the completion or cancellation of all pending contracts" for new work upon or extraordinary repairs of the canals.

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People ex rel. Sage v. Schuyler (17 Hun, 106), reversed.

People ex rel. Wasson v. Schuyler (69 N. Y., 242), distinguished.

(Argued October 8, 1879 ; decided December 9, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, reversing a judgment in favor of relator, entered upon the report of a referee, and awarding judgment absolute against relator. (Reported below, 17 Hun, 106.)

This was an application for a peremptory writ of mandamus, requiring defendant, as auditor of the canal department, to issue his warrant on the treasurer of the State for the amount of, and to pay certain certificates issued by the canal commissioners. An alternative writ was issued, to which return was made. The relator traversed the issues tendered thereon, and the matter was referred to a referee to hear and determine.

The facts as found by the referee are substantially as follows :

Prior to 1848, the State had constructed a canal reservoir and feeder in the town of Nelson, county of Madison, known as the Erieville reservoir, the waters of which passed down Erieville (Nelson) creek into Chittenango creek, the outlet of Cazenovia lake, at a point a few rods from the lake, and thence down the Chittenango creek to the "Rome level" of the Erie canal ; a few rods below the mouth of the Erieville creek, there was a dam across the Chittenango creek, owned by individuals, which furnished power to their mills on the banks of the creek. In 1848 the canal commissioners, temporarily appropriated the waters of Cazenovia lake, and its outlet, Chittenango creek, to furnish an additional supply of water to the "Rome level," and for such purposes erected another dam or bulk-head across Chittenango creek, above the mouth of Erieville creek, which was so arranged that when the water of the lake was low, the water of the Erieville reservoir and creek, stopped by the lower dam, could pass through the gate of the upper

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dam back into the lake, and there be stored until needed for the canal. The canal commissioners at the same time caused gates to be constructed in the lower dam, so that they could control the supply of water at that point, and thereafter down to 1854, the State, by means of these dams and the gates therein, continued to control and use the reservoir, lake and creeks, and controlled and regulated the flow and passage of water over the lower dam for the purpose of feeding the canal. On September 13, 1854, the canal board, by resolution, authorized the permanent appropriation of the water of Cazenovia lake, and adopted maps, plans and estimates, converting the lake into a canal reservoir, to be used in connection with the Erieville reservoir and the two creeks as a feeder to the Erie canal, and the action of the board was reported to the Legislature of 1855 by the canal commissioners, in their annual report for the year 1854. June 5, 1855, the canal commissioners permanently appropriated the waters of the lake and creeks, passing over the lower dam, and instituted measures to carry out the plans adopted by the canal board. July 10, 1855, the canal board changed somewhat the original plan, and adopted what is known as the "citizens' plan," which retained the lower dam at its original height, instead of lowering it, upon condition that certain owners of the water-power should execute a release to the State for damages, which was done accordingly. The other property owners applied for and obtained their damages in consequence of such appropriation, and ever since that time the State has exercised control over the waters passing over the lower dam and other dams erected on the same site, making the use thereof by the mill owners subordinate to the requirements of the canal. In 1855, the canal commissioners, in pursuance of the plan finally adopted by the canal board, constructed a new dam on the site of the old lower dam, and while the same was in progress reported their action and that of the canal board in reference thereto, and the cost of its construction, to the Legislature of 1856, in their annual

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report for the year 1855; and the new dam remained under the control of the canal commissioners until it was carried away by a flood in 1865. The canal officers declining to build another dam, a new one was built by the mill owners on the same site in which, however, a gate was constructed by the canal commissioners, and by means thereof they controlled the flow of water the same as before, until this dam was also carried away by a flood in March, 1872.

“The mill owners having refused to erect another dam, the canal commissioner, then in charge deeming it necessary for the interest of the State, and for the proper use and control of the waters of the Erieville reservoir and of the lake, and intending to appropriate the land or site of the old dam, if such appropriation had not already been made, to the use and benefit of the State, for the purpose of erecting a new dam, wherewith to control and regulate the supply of water from the reservoir and lake, examined said site and directed the engineer in charge to take possession thereof (which he did) and announced to the property owners interested the appropriation thereof, to which they consented; and the commissioner caused a map, plan and estimate for the construction of a new dam on the old site, to be made, and presented the same to the canal board.” The canal board shortly afterward, May 8, 1872, “duly adopted the said plan and estimate,” “and authorized the canal commissioners to advertise and enter into a contract for the construction of the dam, provided the property owners should make a release satisfactory to the attorney-general.” The parties in interest “executed and delivered to the canal commissioners a valid release in writing of all claims against the State for damages on account of such appropriation and use of the mill site and water power,” which was accepted and placed on file in the office of the auditor of the canal department. The commissioners advertised in the State and local papers the letting of the work for the 21st day of May, 1872, and received various bids for the work, and, among others, one from Henry J. Mowry. The next day, May 22, 1872, the

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canal board reconsidered the resolution of May eight, and laid the same on the table. December 18, 1872, the board of canal commissioners assuming to act under chapter 343 of the Laws of 1872 adopted the same plan, directed the reconstruction of the lower dam on the old site, accepted the bid for said work put in by Mowry, and awarded the contract to him; and on the same day made and executed a contract with him for the construction of the dam. The canal board, on the 14th day of February, 1873, appointed a committee to "examine the matter of rebuilding the dam," and report thereon; such report was made on the 19th of March, 1873, containing a full history of all the previous proceedings of the State officers, the board of canal commissioners and the canal board; said board accepted the report, adopted the recommendation of the committee, and approved the action of the commissioners. The canal commissioner in charge on March 3, 1873, in pursuance of the contract, upon the estimate of the resident engineer, duly issued his official certificate to the contractor, directed to the auditor, certifying there was due to the contractor the sum of \$714 upon the contract; and April 7, 1873, in like manner, duly issued to the contractor, another certificate, certifying there was then due to him the further sum of \$1,292; the auditor refused to audit and allow these certificates, "on the ground that there were no moneys in the treasury applicable to their payment;" and the contractor was then informed that "there were no funds to pay him for the construction of the dam under his contract." He declined to go on with the work, until provision was made for payment as it progressed in accordance with the terms of his contract; and the work was accordingly suspended. The canal commissioner in charge, in October, 1873, applied to the relator and requested him to make provision for advancing the money to the contractor, upon his official certificates under the contract, until provision could be made for the payment thereof at the next session of the Legislature, stating to the relator that the

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work was necessary for the interest of the State. In compliance with such request, the relator and one Reuben Parsons, obligated themselves to advance and pay to Mowry the money as earned under his contract with the commissioners, upon the assignment by the contractor to them of the certificates of indebtedness issued by the commissioners under the contract. At the request of the canal commissioner in charge, the contractor then proceeded with and completed the work in pursuance of the contract; and he received the amount he was entitled to, which was advanced and paid from time to time as the work progressed, by the Bank of Cazenovia, on the promissory notes of the relator and Parsons, which were subsequently paid to the bank by the relator. About the 25th of July, 1874, and within ninety days after the completion of the work, the resident engineer, in pursuance of the terms thereof, made and presented a final account to the division engineer, who duly approved and delivered the same to the canal commissioner, and the latter thereupon issued and delivered to the contractor a third certificate for \$7,734.61, the balance due upon the contract, in addition to the amounts of the former certificates. The three certificates were duly assigned and transferred to the relator. "The continuance of the work in the fall of 1873, and the completion of the lower dam was a public benefit and necessary to enable the State to use and control the waters of the Erieville reservoir and Cazenovia lake for the purpose of supplying water to the Erie canal. The work was done in good faith at reasonable prices, and is of great use and benefit to the State; and the State by means thereof has ever since had exclusive control of the waters passing over the dam. The relator had no personal interest in the work or the dam, otherwise than under his collateral contract made at the request of the canal commissioner, and he procured the money to be advanced and paid to the contractor, simply to forward a public work, at the request of a public officer, and upon his representation that it was a public benefit and would be promptly repaid by an appropri-

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tion for that purpose, at the next session of the Legislature.” “The canal commissioner in charge, in his annual report for the year 1872, to the Legislature of 1873, stated the facts as to the carrying away of the old dam, the necessity to the State of the maintenance of the dam, and the action of the canal board and the commissioners in regard thereto, and in reference to contracting for its rebuilding.” And after the completion of the work, the commissioners, in their annual report for the year 1874, to the Legislature of 1875, reported the aggregate amount of the three certificates of indebtedness, as an item of public expenditure as follows: “For rebuilding dam at Cazenovia, \$9,740.61.” “The auditor, in 1875, caused a budget to be made of the items for which appropriations were required to be made to pay claims then outstanding in the canal department, and among others for certificates of indebtedness issued for work done on the Erie canal, which amounted, in all, to \$107,004.03; there was included therein and specifically stated each of the three certificates in question, and the amounts thereof respectively formed a part of said sum. The auditor also caused to be computed the interest due on the certificates of indebtedness, including the three in question, which amounted to \$12,973.08, and caused an act to be drawn and presented to the Legislature, containing said two items of appropriation, which was adopted and passed accordingly by the Legislature. (Chap. 263, Laws of 1875.) In reference to the certificates in question, the referee found that “the act was passed with full knowledge on the part of the Legislature of the facts in reference to the building of the dam, and with intent to ratify the same, and to provide moneys for the payment of the certificates.” The money thus appropriated was collected and paid into the treasury, and thereafter, and before the commencement of this action, the certificates were duly presented to the auditor and demand made that he issue his warrant therefor, which he refused.

Further facts appear in the opinion.

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E. Countryman, for appellant. Chapter 263 of the Laws of 1875 was a ratification, on the part of the Legislature, of the acts of the State officers in rebuilding the dam in question, a recognition of its indebtedness thereby incurred, and an appropriation of means for the payment thereof. (*Merritt v. Millard*, 3 Abb. Ct. of App. Dec., 291; *People ex rel. Martin v. Brown*, 55 N. Y., 180; *Ross v. Curtis*, 31 id., 606; *Murdock v. Aiken*, 29 Barb., 59; 55 N. Y., 187; *Thayer v. City of Boston*, 19 Pick., 511; *First Nat. Bk. of Oxford v. Wheeler*, 72 N. Y., 201.) The Legislature has power to ratify the contract of a municipal corporation which was originally void as *ultra vires*, and thus to render it valid and effectual. (*Nelson v. Mayor of N. Y.*, 63 N. Y., 536; *Brown v. Mayor of N. Y.*, id., 239; *People ex rel. Baker v. Haws*, 36 Barb., 59; *Hasbrouck v. Milwaukie*, 21 Wis., 217; *Campbell v. City of Kenosha*, 5 Wall., 194; *Winn v. Macon*, 21 Ga., 275; *New Orleans v. Clark*, 5 Otto, 644; *Mattingly v. Dist. Columbia*, 7 id., 687; *People v. Stephens*, 71 N. Y., 527.) The legislative recognition may be by implication. No express words of ratification are necessary. The intention may be ascertained from the language of the statute applied to the subject matter, in view of public and notorious facts at the time, and of all the surrounding circumstances. (*Brown v. Mayor of N. Y.*, 63 N. Y., 239; *Nelson v. Mayor of N. Y.*, id., 536; *People v. Flanigan*, 66 id., 238; *People v. Stephens*, 71 id., 527, 537; *Campbell v. City of Kenosha*, 5 Wall., 194; *Mattingly v. Dist. Columbia*, 7 Otto, 687.) It will be presumed that the Legislature was cognizant of all such facts and circumstances. (*Brown v. Mayor of N. Y.*, 63 N. Y., 239; *Nelson v. Mayor of N. Y.*, id., 536; *People v. Flanigan*, 66 id., 242; *People v. Super. Livingston*, 68 id., 115; *Moore v. Mayor of N. Y.*, 73 id., 238.) The act of an agent may always be presumed to have been ratified by his principal when the acts and conduct of the latter are inconsistent with any other supposition, as where he receives and holds the fruits of the agent's acts, and a considerable period of time has elapsed without any

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dissent. (*Maddock v. Bevon*, 39 Md., 485; *Elwell v. Chamberlain*, 31 N. Y., 611; *Farmers' Loan Co. v. Walworth*, 1 id., 433; *Sage v. Sherman*, 2 id., 418; *New Hope Bridge Co. v. Phoenix Bank*, 3 id., 156; *Hoyt v. Thompson's Ex.*, 19 id., 208; *Bridenbecker v. Lowell*, 19 Barb., 10.) The work having been completed and accepted, the act of the Legislature in making provision for its payment is conclusive and cannot be reviewed in the courts. (*People v. Hows*, 21 How., 179; *Guilford v. Super. of Chenango*, 13 N. Y., 143; *People v. Mayor of Brooklyn*, 4 id., 419; *New Orleans v. Clark*, 5 Otto, 644; *People v. Williams*, 55 N. Y., 367; *People v. Super. Kings*, 52 id., 556.) The act of 1875 was not repealed by chapter 425 of the Laws of 1876. (*Van Rensselaer v. Snyder*, 9 Barb., 302; *Bowen v. Lease*, 5 Hill, 221; *People v. Palmer*, 52 N. Y., 84; *Smith v. People*, 47 id., 331; *In re Barber*, 86 Penn., 392.) If the act of 1876 repealed the act of 1875, it could not affect the rights of the relator, which had vested under the law. (*Palmer v. Conley*, 4 Den., 374; 2 N. Y., 182; *Vanderkar v. R. and S. R. R. Co.*, 13 Barb., 393; *People v. Trinity Church*, 22 N. Y., 44; *People v. Super. Westchester*, 4 Barb., 64; *Benson v. Moyer*, 10 id., 223; *Lewis v. Eastford*, 44 Conn., 477; *Arlington v. Pierce*, 122 Mass., 270; *Hall v. Holden*, 116 id., 172; *Greenland v. Weeks*, 49 N. H., 472; *People v. Stephens*, 71 N. Y., 527.) The contract was valid without a ratification by the Legislature. (*Green v. Mayor of N. Y.*, 60 N. Y., 303; *People ex rel. Seymour v. Canal Bk.*, 7 Lans., 220; *Hall v. Holden*, 116 Mass., 172; *Arlington v. Pierce*, 122 id., 270; *Hunneman v. Grafton*, 10 Metc., 454; *Sheldon v. Wright*, 7 Barb., 39; *Bloom v. Burdick*, 1 Hill, 130; *Ford v. Walsworth*, 19 Wend., 334; *Hartwell v. Root*, 19 J. R., 345; *Leland v. Cameron*, 31 N. Y., 115; *Jackson v. Sternberg*, 11 J. R., 513; *Peterson v. Mayor of N. Y.*, 17 N. Y., 449; *Niles v. Patch*, 13 Gray, 254; *Baker v. Johnson*, 2 Hill, 342; *Ten Broeck v. Sherrill*, 71 N. Y., 277; *Turrell v. Norman*, 19 Barb., 223.) Plaintiff is entitled to recover the fair value of the material furnished upon an

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implied promise for the payment thereof, and in the absence of other evidence, the amount stipulated in the contract may be assumed to be the true value. (*Clark v. U. S.*, 5 Otto, 539; *New Orleans v. Clark*, 5 id., 644; *Solomon v. U. S.*, 19 Wall., 17; *U. S. v. Gill*, 20 id., 517; *Nelson v. Mayor of N. Y.*, 63 N. Y., 544; *Moore v. Mayor of N. Y.*, 73 id., 238.)

E. W. Paige, for respondent. The contract of December 18, 1872, was one for an extraordinary repair, or for new work, and was illegal and void. (1 R. S., p. 647, §§ 19, 20, [6th ed.]; 1 R. S., p. 650, § 39; Laws of 1870, chap. 767, vol. 2, p. 1905.) The statutes relating to the letting of contracts for new work and extraordinary repairs upon the canals not having been complied with, the contract was void. (*Dickinson v. Poughkeepsie*, MS. Ct. of App.; *McDonald v. City of New York*, 68 N. Y., 23; *Brady v. Mayor of N. Y.*, 2 Bosw., 173; 20 N. Y., 312; *Halstead v. Mayor, etc.*, 3 Comst., 430; *Hogan v. City of Brooklyn*, 52 N. Y., 282; *Fox v. City of New Orleans*, 12 La. Ann., 154; *Johnson v. Common Council*, 16 Ind., 227; *Butler v. Charleston*, 7 Gray, 12; *Swift v. Williamsburgh*, 24 Barb., 427.) Canal commissioners are public agents, and public agents whose duties and powers are prescribed by statutes, and are conclusively presumed to be known by all; and where a public agent exceeds his authority, the principal is not bound by the contract made. (*Dellafield v. State of Illinois*, 26 W. R., 192; *State v. Hastings*, 10 Wis., 525; *Baltimore v. Reynolds*, 20 Md., 1; *Hull v. Marshall*, 12 Iowa, 142; *Whiteside v. United States*, 3 Otto, 247; Story on Agency, § 307; *Pierce v. United States*, 1 Ct. of Claims Rep., 270; *Brady v. Mayor*, 20 N. Y., 312; *McSpedon v. Mayor*, 7 Bosw., 601; *Peterson v. Mayor*, 17 N. Y., 349; Smith on Stat., §§ 676, 677; *Brown v. Mayor*, 63 N. Y., 239.) Chapter 263 of the Laws of 1875 (if not repealed) was not a ratification of the illegal contract of December 18, 1872, and creates no liability on the part of the State to pay

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the certificates given under that contract. (*Owen v. Hull*, 9 Peters, 627; *Baldwin v. Burroughs*, 47 N. Y., 199; *Nixon v. Palmer*, 8 id., 399; *Seymour v. Wyckoff*, 10 id., 214; *Peo. ex rel. Wasson v. Schuyler*, 69 id., 242; *People v. Fields*, 58 id., 491; *Bd. Sup. v. Ellis*, 59 id., 620; *Lancey v. Bryant*, 30 Me., 466; *People v. Batchellor*, 22 N. Y., 128.) A ratification made upon erroneous information and in ignorance of the truth is not binding. (*Murray v. Binnenger*, 36 N. Y., 61; *Bk. of Beloit v. Beale*, 34 id., 473; *Keeler v. Salisbury*, 33 id., 653; *Palmer v. Huxford*, 4 Den., 166; *Morrell v. Dixfield*, 30 Me., 157; 2 Hill, 161; *Peo. ex rel. Schuyler v. Wasson*, 69 N. Y., 242.) Chapter 263, Laws 1875, was repealed by chapter 425, Laws 1876. (*Hadden v. The Collector*, 5 Wall., 107; *Flynn v. Abbott*, 16 Cal., 358; *State v. Cazeon*, 8 La. Ann., 114.) As the law was not in force when the contract was made, and neither the relator nor his assignor did anything in reliance upon its existence, it was competent for the Legislature to repeal the law. (*Peo. ex rel. v. Sup. Montgomery Co.*, 67 N. Y., 109.)

RAPALLO, J. The only ground upon which the majority of the General Term appear to have rested their decision is, that it did not appear that the Legislature at the time of the passage of the act of 1875, (Laws of 1875, chap. 263,) had sufficient knowledge of the facts, to render that act effectual as a ratification of the acts of the canal commissioners in building the dam in question, and issuing the certificates of indebtedness held by the relator.

The referee found as facts, that the statute in question was passed with full knowledge on the part of the Legislature, of the facts in reference to the building of the dam, and with intent to ratify the same, and to provide means for the payment of said certificates, and that the money to pay said appropriation was collected and paid into the treasury, and, that there remained in the treasury unexpended a sum sufficient to pay the certificates held by the relator, and the

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legal interest thereon. These findings unless wholly unsupported by evidence must be regarded as establishing the facts of the case. They show a clear right in the relator to payment, and, that it was not the duty of the financial officers of the State to go behind the legislative direction and seek for technical objections to the validity of the contract under which the work was done, no fraud or imposition of any kind being shown or even alleged. The evidence upon which these findings are based is very voluminous, but it establishes in substance that the money for which the certificates in question were issued, was advanced by the relator at the request of the canal commissioners, for the purpose of expediting a work of public necessity, for which there was not on hand any unexpended appropriation, and that the advance was made in reliance upon the future appropriation by the Legislature of money to reimburse the relator. That the acts of the canal commissioners in respect to the particular work in question were communicated to the Legislature from time to time, by the official reports of the commissioners, which stated the amount expended, and the purposes of the expenditure, in accordance with the facts. No suppression or misinformation is charged, except that in the respondent's points it is alleged that the reports failed to state that the contract had been executed without the direction of the canal board, and misstated that the plans and estimates had been adopted by the canal board and also omitted to state that the dam was constructed on plans different from those adopted by the canal board. It appears however from the findings, that in March, 1873, the canal board, after a full investigation of the matter and of the action of the commissioners in awarding the contract in question, and with the contract before them substantially approved such action of the commissioners.

It also appeared that the amount appropriated by the Legislature of 1875 for the payment of outstanding certificates of indebtedness issued for work done on the canal, corresponded precisely with the amount of a budget made up in

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the auditor's department and furnished to the Legislature when engaged in making the appropriation, in which budget the three certificates held by the relator were specifically described and included. We do not think that the referee went too far in regarding this circumstance as evidence of an intention on the part of the Legislature to provide specifically for the payment of these certificates. The identity of amount, together with the proof that the budget was furnished from the proper office as a basis for the action of the Legislature, afford evidence that the appropriation was founded upon that budget and was intended to cover it, and it cannot be said that the finding of the referee is unsupported, that the appropriation was made for the payment of the certificates held by the relator and included in the budget. This fact being established the discussion of the questions of ratification, and of the knowledge of the Legislature of the facts relating to the contract, and of the validity of the contract becomes unimportant. The appropriation was an act within the power of the Legislature, and no inquiry is admissible as to the reasons or information upon which it acted. Acts of the Legislature cannot be invalidated or disregarded on any such grounds. If the relator had done the work voluntarily, without the authority of any public officer, yet if the Legislature saw fit to pay for it, or to appropriate money for such payment, no disbursing officer of the government could refuse to apply the money to the purpose for which it was appropriated, on the ground that the State was not originally under any legal obligation to make the payment, or that the Legislature was not sufficiently informed of the facts. The only question for such officer to consider would be whether the appropriation was made for the purpose claimed. When that is ascertained his duty is merely ministerial and he has no power to supervise the action of the Legislature, or inquire into the extent or accuracy of the information upon which such action was founded.

For the reasons stated by the referee we do not think that the act of 1876 (chap. 425) had the effect of repealing the

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appropriation, of which the relator claims the benefit. The case is clearly distinguishable from that of *People ex rel. Wasson v. Schuyler* (69 N. Y., 242).

The judgment of the General Term should be reversed, and the judgment on the report of the referee affirmed, with costs.

All concur, except EARL, J., not voting.

Judgment accordingly.

THE GLOBE MUTUAL LIFE INSURANCE COMPANY, Appel-
lant, v. ADDIE REALS et al., Respondents.

An action to procure the cancellation of a written instrument cannot be maintained, unless some special circumstance exists establishing the necessity of a resort to equity, to prevent an injury, which might be irreparable and which equity alone is competent to avert; it is not sufficient that a defense exists as against the instrument, or that evidence may be lost.

In an action to procure the cancellation of a policy of life insurance, the complaint alleged that the policy was obtained by fraud and conspiracy between plaintiff's agent and the insured; that the premium was not paid in cash, as required by the policy, but by the note of the insured, and was delivered to the latter when he was sick, of which sickness the insured died. The complaint also averred that plaintiff feared the holder of the policy would commence an action thereon, and by collusion with said agent obtain an appearance on its behalf, and from failure to answer, or to duly defend the action, obtain a judgment without plaintiff's knowledge, thus preventing plaintiff from presenting its defense, or that defendants would delay bringing an action until the evidence of fraud and conspiracy was lost. The referee found that there was no fraud; the other facts were found substantially as alleged in the complaint. *Held*, that the complaint was properly dismissed.

(Argued November 26, 1879; decided December 9, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of defendants, entered upon the report of a referee.

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This action was brought to procure the cancellation and surrender of a policy of life insurance, issued by plaintiff upon the life of James H. Reals, for the benefit of his wife and children, the defendants herein.

The complaint alleged in substance that said Reals, upon the solicitation of one Fowler, an agent of plaintiff, made application for the policy, which application contained a provision that the policy to be issued thereon should, under no circumstances, be in force until actual payment in money of the premium, and that no agent of the company has power to deliver the policy until such payment. That such application was forwarded to plaintiff and accepted. A policy was issued and sent to the agent containing a similar provision as to the payment of the first premium, with instructions to deliver on payment; that at the time of making the application Reals gave his note at thirty days for the first premium; that after the receipt by said agent of the policy, Reals notified him that he desired to rescind his application and would not accept the policy, and demanded his note, which Fowler refused to surrender; that soon after Reals was taken sick and sent for Fowler, and they conspired together to cheat and defraud plaintiff. In pursuance whereof Fowler delivered to Reals the policy, he retaining the note, all of which facts were concealed from plaintiff; that a few days thereafter, and before the maturity of the note, Reals died of such sickness, and the note was subsequently paid to Fowler; that immediately upon being advised of the facts plaintiff tendered back to defendant, Mrs. Reals, the amount paid and demanded the policy. The complaint also contained this clause:

“Tenth. And the plaintiff further shows that said policy is in the hands of said defendant, Addie Reals, and that it fears that said Addie Reals will commence an action against the plaintiff thereon, and by collusion with the defendant Fowler, the agent of this plaintiff, as hereinbefore set forth, obtain an appearance from some attorney in Syracuse or elsewhere, on behalf of this plaintiff, and from failure to

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answer or otherwise duly defend the said action, that judgment will be entered against the plaintiff therein without the knowledge of the plaintiff, and the plaintiff will be prevented from presenting its defense upon the merits in the said action, and that the plaintiff will suffer great damage. Or that the defendants will delay bringing an action on said policy until the evidence of the fraud and conspiracy of defendants shall be lost to the plaintiff."

The referee found the facts as to the application for and delivery of the policy substantially as alleged in the complaint, save that he found the note was taken by said agent at his own risk by the consent and permission of plaintiff, and also that the evidence failed to show any conspiracy or fraud. As conclusions of law, he found that the prepayment of the premium was waived; that the charges of fraud not being established the policy was valid and binding, and thereupon directed a dismissal of the complaint.

Fred. I. Small, for appellant. A court of equity has power to compel the surrender and cancellation of the policy in this case. (*McHenry v. Hazard*, 45 N. Y., 581; *Globe v. Reals*, 48 How., 502; affirmed, 50 id., 237.) Payment of the premium in full was a condition precedent to the policy taking effect. (*Baker v. Union Ins. Co.*, 43 N. Y., 283; *Howell v. Knick. Co.*, 44 id., 276; *Rochner v. Knick. Co.*, 63 id., 164; *Mersereau v. Phoenix Co.*, 66 id., 274; *Walsh v. Niagara Co.*, 73 id., 5; *Thayer v. Agricultural Co.*, 5 Hun, 566; *Lee v. Guardian Co.*, 5 Bige., 18.) There could be no consummation of the contract until the payment was actually made. (May on Insurance, 57, 139; *Bently v. Columbia Co.*, 17 N. Y., 424; *Foot v. Aetna L. Ins. Co.*, 61 id., 571; *Chase v. Hamilton Co.*, 20 id., 52; *Nat. Ins. Co. v. Meach*, 53 id., 144; *Piedmont and A. Ins. Co. v. Ewing*, 92 U. S. [2 Otto], 377; *Whitbury v. P. and A. Ins. Co.*, 4 Bige., 361; *Brit. Eq. Ins. Co. v. G. W. R. Co.*, 3 id., 264.) The fact that the premium was received by the plaintiff is no waiver of the agent's acts, it having no

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knowledge of the circumstances under which it had been paid, and having offered to return it immediately upon learning those circumstances. (*Kolpus v. Guardian Co.*, 58 Barb., 185; *Nixon v. Palmer*, 8 N. Y., 398; *Smith v. Tracy*, 36 id., 79.) The obtaining and retention of the policy was a fraud upon the plaintiff. (*Gale v. Gale*, 19 Barb., 246; Willard's Eq. Jur., 147, 167, 168.)

George Doheny, for respondents. Fowler, who was appointed agent by plaintiff's general agent, had power to waive the provisions of the policy as to the payment of the premium in money. (*Conover v. Mut. Ins. Co. of Albany*, 1 Comst., 290; *Olcott v. Tioga R. R. Co.*, 40 Barb., 187; Dunlap's Paley on Agency, 199; Story on Agency, §§ 126-127; *Van Allen v. Farmers' Jt. St. Ins. Co.*, 10 Hun, 399; *Marcus v. St. Louis M. L. Ins. Co.*, 68 N. Y., 625; *Bodine v. Ex. F. Ins. Co.*, 51 id., 117; *Leslie v. Knick. L. Ins. Co.*, 63 id., 27; *Dean v. Aetna L. Ins. Co.*, 62 id., 643; *Dilleber v. Knick. L. Ins. Co.*, Ct. Appeals, April 1, 1879.) The case presents no circumstances for the interference of a court of equity, and the complaint should be dismissed. (*McHenry v. Hazard*, 45 N. Y., 581; *Town of Venice v. Woodruff*, 62 id., 462; *Fowler v. Palmer*, 62 id., 533.)

MILLER, J. This action was commenced for the cancellation and surrender of a policy of insurance upon the life of James H. Reals, deceased, upon the ground that it was obtained by fraud and conspiracy between the plaintiff's agent and the deceased, and for the reason that it was void, because the premium was not paid in cash and a note given for the same by the insured. The referee found that the charge of fraud was not established by the evidence, and that the policy of insurance was a binding contract of insurance upon the plaintiff, and directed that the complaint be dismissed. These findings are, we think, sufficiently supported by the testimony, and the case presented furnishes no ground for the interference of a court of equity. Such a court will

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not interfere to decree the cancellation of a written instrument unless some special circumstance exists establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is competent to avert. That a defense exists is insufficient. Nor is it enough that the evidence may be lost: (*Town of Venice v. Woodruff*, 62 N. Y., 462.) The fraud alleged is a conspiracy between the agent and the deceased. The fraud, if any, was not proved on the trial, as the referee found, and hence the action cannot be sustained upon that ground. The allegation that the plaintiff fears an action may be commenced, and by collusion with the defendant, Fowler, the agent of the plaintiff, an appearance be obtained, and from failure to answer or defend, a judgment may be entered against the plaintiff, or that the defendant will delay bringing on the action until evidence of the fraud and conspiracy shall be lost to the plaintiff, furnishes no ground for such an action. The testimony can be perpetuated under the statute, and any order or judgment obtained by a conspiracy to prevent the plaintiff's appearance or to procure such judgment fraudulently could be set aside upon motion. In fact, all the rights of the plaintiff could be amply protected in a defense to an action brought upon the policy, and there are no special circumstances calling for the interference of a court of equity: (*Fowler v. Palmer*, 62 N. Y., 533.) The referee was, therefore, clearly right in dismissing the complaint.

The various rulings in regard to the admission of testimony were entirely immaterial, as the action could not be sustained, and they do not demand comment. The objections made relating to the validity of the policy and the delivery of the same, are also unimportant, as these are matters of defense which may properly arise in an action upon the policy. We are unable to discover any valid ground for interfering with the judgment upon the referee's report, and are of the opinion that the same should be affirmed.

All concur.

Judgment affirmed.

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GEORGE R. BOOTS, Appellant, v. NORMAN B. WASHBURN
et. al., Respondents.

Where a highway bridge in the town of G. was carried away by a flood shortly prior to the town meeting of 1878, *held*, that the commissioners of highways of the town, with the consent of the board of town auditors, were authorized to enter into a contract for the rebuilding of the bridge, under the provisions of the act providing for "the speedy construction and repair of roads and bridges," etc. (§ 1, chap. 103, Laws of 1858, as amended by chap. 442, Laws of 1865), which authorizes the commissioners of highways of a town, with such consent, where a bridge has been damaged or destroyed after a town meeting, to cause the same to be immediately repaired or rebuilt.

Also *held*, that the commissioners were authorized to contract to pay for the bridge upon the completion thereof, although they had no money in their hands for that purpose.

It seems, that in such case the commissioners have power, under said statute, to borrow money upon the credit of the town to pay for the bridge. In an action upon such a contract, it appeared that the consent of the board of town auditors to the rebuilding of the bridge was given at its regular annual meeting, when all the members of the board were present; it did not appear whether the consent was in writing or not. *Held*, that, if requisite, it would be assumed that a record of the consent was properly made.

There were three commissioners of highways of the town, all of whom united in the determination to rebuild the bridge, and in the application to the board of auditors; also in the agreement upon the plan, and that the work should be by contract, the letting to be advertised. At the time the contract was let and entered into, one of the commissioners was absent, he not having received actual notice in time to attend; his name was signed to the contract by one of the other commissioners, who previously, by his consent, had signed his name to the advertisement; he afterwards, with knowledge of the facts, acted with the other commissioners in reference to the bridge without any objection, and never questioned the validity of the contract. *Held*, that the contract was to be treated as the valid contract of the three commissioners.

The complaint in the action set forth the contract, in which the defendants were described as commissioners, and that they signed it as such; they were not described in the summons and complaint as commissioners, and judgment was asked against them personally. *Held*, that plaintiff was properly nonsuited, because defendants were not sued officially as commissioners; that under the statute providing for actions upon such contracts (2 R. S., 473, § 92) it was necessary to specify "in the process, pleadings and proceedings their name of office;" that the statutory requirement was not merely formal, but matter of substance, to the end

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that the amount collected might be allowed in the official account of the commissioners (2 R. S., 476, § 108); also as it affected the place of trial.

(Argued November 26, 1879; decided December 9, 1879.)

APPEAL from a judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of defendants, entered upon a nonsuit.

This action was brought by the plaintiff, as assignee of one William Conley, upon a written contract executed by defendants, a copy of which was set forth in the complaint, and is as follows:

"Agreement made this 31st day of May, 1873, between John Washburn, N. B. Washburn and David A. Southerland, commissioners of the town of Gorham, and William Conley, of the town of Potter, Yates county. The said William Conley agrees, for and in consideration of the sum of one thousand dollars, to build a certain bridge across Flint Creek in the village of Gorham; said bridge to be fourteen feet wide, and a foot path four feet wide on the south side; a good, nice, and suitable railing on the said foot path — said bridge made and finished otherwise in the same manner as the bridge at Potter Centre; the foundation to be piles, to be driven nine feet below the water, unless struck by rock; two rows — the first row close together, six in the back row, wings on each corner, on the north side six piles, and sill to be below the water, sill to be framed to piles, and bent to be framed to sill; said bridge to be planked with three-inch white oak plank; said bridge to be completed and ready for crossing on the 15th day of July, 1873; bridge to be paid for when finished and accepted by the commissioners.

[Signed] "WILLIAM CONLEY,
"N. B. WASHBURN,
"JOHN WASHBURN,
"DAVID A. SOUTHERLAND,
"Commissioners."

Nowhere else in the complaint were defendants described as commissioners, but in it and in the summons they were

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simply named as individuals, and judgment was asked against them as such.

The answer alleged, in substance, among other things, that defendants were in fact commissioners of the town at the time of entering into the contract, and that they executed it as such.

The further facts appear sufficiently in the opinion.

Samuel Hand, for appellant. The defendants being unauthorized to contract, as commissioners of highways, a debt against the town or their successors in office were liable individually. (*Mather v. Crawford*, 36 Barb., 564; *Barker v. Loomis*, 6 Hill, 463; *Van Alstyne v. Friday*, 41 N. Y., 174; *McCoy v. Curtice*, 9 Wend., 17; *Stewart v. Waller*, 30 Barb., 347; *Walker v. Dunspaugh*, 20 N. Y., 170.)

H. L. Comstock, for respondents. The action is not brought against the defendants in their official character, as commissioners of highways. (2 R. S., 473, 474, §§ 92, 93, 108; *Suprs. of Galway v. Stimson*, 4 Hill, 136; *Comrs. Highways v. Peck*, 5 id., 215; *Gould v. Glass*, 19 Barb., 179; *Paig v. Fazackerly*, 36 id., 392.) If the plaintiff desired to sue the defendants in their official character, he should not only have named them, but he should also have specified "in the process, pleading and proceedings, their name of office." (2 R. S., 476, § 96.) The defendants had authority to make the contract in their official character, as commissioners of highways, "by and with the consent of the board of town auditors, or a majority thereof." (Laws of 1865, chap. 442, § 1; 6 Edmonds' Stat. at Large, 485.) If the defendants have contracted so as to bind the town, or, rather so as to bind themselves in their official character, as commissioners of highways, for the contract price of building the bridge, they are not personally liable. (*Bellinger v. Bentley*, 4 N. Y. Sup., v. 71; *Brockway v. Allen*, 17 Wend., 40; *Stanton v. Camp*, 4 Barb., 274; *Randall v. Snyder*, 1 Lans., 163; *Becker v. Lamont*, 13 How. Pr., 23; *Randall v. Van*

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Vechten, 19 J. R., 60; *Haight v. Schaler*, 30 Barb., 218.) There was no want of power to bind the town, or the commissioners in their official character, for the contract price of building the bridge. *Hover v. Barkhoof*, 44 N. Y., 113; *Bryan v. Landon*, 5 N. Y. Supr. Ct., 594; *Robinson v. Chamberlain*, 34 N. Y., 389.) The power to cause the bridge to be built being granted, all the powers necessary for the exercise of this power are implied. (*Ketcham v. City Buffalo*, 21 Barb., 294; S. C. on Appeal, 14 N. Y., 356; *People v. Lowber*, 28 Barb., 65; *People v. Brennan*, 39 id., 522, 545; *Peterson v. Mayor, etc.*, N. Y., 17 N. Y., 449, 452.)

EARL, J. The facts of this case, as I understand them, are as follows: The defendants were, in the years 1872 and 1873, the commissioners of highways of the town of Gorham, Ontario county. A highway bridge was carried away by a flood in the spring of the year of 1873 before the town meeting, and the defendants applied to the board of town auditors for their consent to rebuild the bridge, and the consent was given. They then proceeded to let the contract for rebuilding the bridge, and May 31, 1873, let it to William Conley for the price of \$1,000. He assigned the contract to the plaintiff, who built the bridge. The defendants were described in the contract as "Commissioners of the town of Gorham," and they signed it as commissioners. It provided that the bridge should be completed on the fifteenth day of July, and that it should be paid for "when finished, and accepted by the commissioners."

After the bridge was built, the defendants, upon the demand of the plaintiff, refused to pay him the contract price, claiming that the bridge was not built as required by the contract. The plaintiff then commenced this action. The defendants are not described in the summons or complaint as commissioners of highways, but the contract is set out at length and judgment is demanded against them personally for the amount claimed. The answer denies the complaint generally, sets up that the defendants made the contract.

officially as commissioners of highways, and that they are not liable to be prosecuted individually ; and alleges that the plaintiff did not build and complete the bridge according to the contract, and in consequence thereof they claim damages.

Upon the trial, the plaintiff was nonsuited, on the ground that he had not sued the defendants officially, as commissioners of highways ; and whether or not he was properly nonsuited, presents the sole question for our consideration.

I do not understand that it is questioned that the defendants contracted in form as commissioners of highways, in their official capacity. But the plaintiff seeks to maintain his appeal upon either one of two inconsistent grounds. He contends, first, that the contract was legally made by the defendants as commissioners, and that he has sued them as such ; second, that while they contracted officially, they had no power to do so, and hence that they are bound individually, and that the suit may be treated as one against them individually.

The defendants claim that the contract was legally made by them, as commissioners of highways, and that they have not been sued in their official capacity. They do not, however, dispute, as I understand it, that they are liable individually, if they made the contract without authority and are not, therefore, officially bound thereby.

I am of opinion that the defendants were authorized to make the contract, and that they were legally bound thereby, as commissioners of highways.

This bridge was carried away after the town meeting of 1872 and shortly before the town meeting of 1873; and hence the defendants were authorized to rebuild it, under chapter 442 of the Laws of 1865, provided they first obtained the consent of the board of town auditors. This consent they obtained. They made application for it to the board at their regular annual meeting, when all the members thereof were present. It does not appear that the consent was in writing, nor does

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it appear that it was not. If necessary, it might be assumed that a record of it was properly made.

The objection that the contract was not made by all the commissioners, is not well taken. They all united in the application to the board of auditors. They all determined that the bridge must be rebuilt; and they agreed upon the plan, and that the contract should be let, and that the letting should be advertised. At the time the contract was let under the advertisement and the contract was actually made, John Washburn, one of the commissioners, was not present, not having received actual notice in time to attend. But his name was signed to the contract by one of the other commissioners, as it had been, by his consent, to the advertisement. It may be doubted if any other notice to him was necessary than that given in the public notice of the letting thus signed by him. But he afterwards knew that the contract was let, and that his name was signed thereto, and he never made any objection to it, but acted with the other commissioners in reference thereto, thus recognizing the same, and he does not now, and never did repudiate the contract. His claim now is that the contract was a valid, binding contract upon the commissioners as such. Under such circumstances I think it is quite clear that the contract must be treated as the valid contract of the three commissioners.

The further claim is made that the contract did not bind the commissioners officially, because they exceeded their authority in agreeing therein to pay for the bridge upon the completion thereof, as they did not then have the money, and had no authority to create a debt against the town. The Law of 1865 amended section 1 of chapter 103 of the Laws of 1858, and it provided that after obtaining the consent of the town auditors, the commissioners should cause the bridge "to be immediately repaired or rebuilt." This they could do by purchasing the materials and building the bridge by days work, or they could let the entire contract for a gross sum. In either event, they would, in some sense, create a debt against the town for which they acted. They could

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not well discharge their duty in any other way. They were certainly not obliged to build the bridge at their own expense or upon their own credit, and could do no otherwise than to build it at the expense and upon the credit of the town; and I am inclined to think that they had implied authority to borrow the money upon the credit of the town. It could make no difference with the town, whether it owed the bridge builder, or a person who loaned the money to build the bridge. The power to borrow seems to be plainly contemplated by the statute of 1865, as that provides that "the commissioners of highways shall present the proper vouchers for the expense thereof to the town auditors, at their next annual meeting, and the said bill shall be audited by them, and the amount audited thereon shall be collected in the same manner as amounts voted at town meetings as now required." It is clearly implied from this language that the commissioners might pay for the work as it was done; that they should take vouchers for the payments, and present them for audit; and that they should either pay thereon money to be reimbursed to them by the town, or that they might borrow it, to be subsequently paid by the town. It appears, in this case, that the commissioners borrowed the money; but whether they borrowed it upon their own credit, or upon that of the town, does not appear. It is clear, therefore, that there was no excess of authority in agreeing to pay for the bridge when completed.

It is true that, instead of agreeing to pay for the work when completed, and then, in case of payment, having their vouchers audited as provided in section one, they could have purchased the material and employed labor, leaving the persons who furnished the material and labor to have their claims audited by the board of auditors, specially convened for that purpose under sections two and three of the Law of 1858; but they were not obliged to do it in that way.

I conclude, therefore, that the defendants had authority to agree to pay the plaintiff when he completed the bridge;

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and that he had no concern with the manner in which or the source from which they obtained or proposed to obtain the money to pay him.

The contract was, therefore, a valid contract binding upon the defendants officially as commissioners of highways, and they should have been sued as such. Actions against commissioners of highways are required to "be brought against them individually, specifying in the process, pleadings and proceedings, their name of office:" (2 R. S., 473, § 92); and when thus commenced, the action shall not "be abated or discontinued by the death of such officers, their removal from or resignation of their offices, or the expiration of their term of office; but the court in which any such action shall be pending shall substitute the names of the successors in such offices, upon the application of such successors or of the adverse party:" (2 R. S., 474, § 100); and in such actions, the judgment "shall be collected in the same manner as against individuals; and the amount so collected shall be allowed to them in their official accounts: (2 R. S., 476, § 108.) Here the defendants are not named in the summons or complaint as commissioners of highways, and there is nothing to indicate that the suit is against them as such. The suit is plainly one against them as individuals.

These requirements of the statute are not merely formal, but are matters of substance, that the successors, if any, in office of the defendants could be substituted, and that any amount collected against them upon any judgment might be allowed to them in their official accounts, and also in reference to the place of trial.

The plaintiff was, therefore, properly nonsuited. The defendants at no time claimed that they were not officially bound by the contract, and they never repudiated it. At the first opportunity, they pointed out the defect in the pleading. Their objection was sustained at the Circuit, at the Special Term, and at the General Term. The defect was one easily remedied; and now when the plaintiff has brought his case here with a persistence worthy of a better cause, he

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cannot justly complain that the test of the statute is strictly applied to his proceedings.

The judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

**HENRY TUTHILL et al., Respondents, v. THEODORE BOGART,
Appellant.**

Plaintiffs entered into a contract with S. & G., by which the former agreed to malt for the latter 25,000 bushels of barley from October 1, 1875, to June 1, 1876, at a price specified. Plaintiffs were to purchase the barley, and ship the malt when directed by S. & G., who were to have the increase. S. & G. agreed to accept plaintiffs' drafts "in payment for the purchase of the barley," or to furnish satisfactory notes. At the close of each month plaintiffs were to furnish a statement of the amount malted, and on presentation S. & G. agreed to pay the price for malting. S. & G. also agreed to pay interest, exchange and insurance on the barley and malt from the time the barley was paid for by plaintiffs until the malt was delivered. Plaintiffs were authorized to retain and hold as security, after June first, a sufficient amount of the malt to pay any notes or drafts then unpaid. In an action for malt manufactured under the contract, but not delivered or paid for, which had been levied upon by defendant as sheriff, under and by virtue of an execution against S. & G., *held*, that the legal title in the malt was in the plaintiffs until paid for, and that S. & G. had no leviable interest therein.

(Argued December 2, 1879 ; decided December 9, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiffs, entered upon the report of a referee. (Mem. of decision below, 14 Hun, 487.)

This action was brought to recover damages for the alleged taking and conversion of a quantity of malt which was levied upon by defendant as sheriff under and by virtue of an execution against Smith & Girvan.

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On September 29, 1875, plaintiffs, said Smith & Girvan, entered into the following contract :

“ This agreement, made this 29th day of September, 1875, by and between H. & E. D. Tuthill, of Penn Yan, Yates county, N. Y., and Smith & Girvan, of the city of New York, as follows :

“ The said H. & E. D. Tuthill agree to malt for said Smith & Girvan, at their malt-house in Penn Yan aforesaid, twenty-five thousand bushels of barley during the season from the 1st day of October, 1875, to the 1st of June, 1876, at the rate of twenty-five cents per bushel for each and every bushel of barley so malted; the said barley when made into malt to be delivered by the said H. & E. D. Tuthill free of expense on board of cars at Penn Yan aforesaid; the said Smith & Girvan to have and receive all the increase of the said barley after the same is manufactured into malt, and the same shall be manufactured in a good and workmanlike manner, upon the following conditions :

“ The said H. & E. D. Tuthill shall purchase the barley on the market at market rates, and the said barley shall consist of fifteen thousand bushels of what is known as six-rowed State, and of ten thousand bushels of what is known as two-rowed State, and shall be of good quality.

“ And the said H. & E. D. Tuthill shall ship the malt at such times and in such quantities as the said Smith & Girvan may direct, the accumulation of such malt not to exceed six weeks' malting. The said Smith & Girvan are to furnish all bags required for shipment. The said Smith & Girvan agree to accept the drafts of said H. & E. D. Tuthill on New York city at sixty days in payment for the purchase of said barley, unless said Smith & Girvan shall furnish such brewers' notes, indorsed by said Smith & Girvan, having not more than ninety days to run, as said H. & E. D. Tuthill can use, or such as will be satisfactory to them, in place of said drafts or some of them. Said H. & E. D. Tuthill are to furnish and deliver to said Smith & Girvan at the close of each month of said period, a statement of the amount malted dur-

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ing that month, and said Smith & Girvan agree to pay the same on presentation. The said Smith & Girvan agree to pay the necessary interest and exchange; also insurance on the barley and malt from the time said barley is paid for by said H. & E. D. Tuthill until it is delivered on the cars as aforesaid; also the interest and exchange on such notes or drafts as may be given in payment for the malt when shipped.

“It is further agreed that said H. & E. D. Tuthill may retain and hold, after the first day of June next, a sufficient amount of the malt aforesaid to pay any notes or drafts above mentioned remaining then unpaid, as security for the payment thereof, until paid.

“In witness whereof, we have hereunto subscribed our names, the day and year first above mentioned.

“[Signed] H. & E. D. TUTHILL,
SMITH & GIRVAN.”

“In presence of L. J. RICE.”

The referee found, in substance, that plaintiffs under and in pursuance of the contract prior to May 1, 1876, purchased the 25,000 bushels of barley called for by the contract, paid for the same and manufactured it into malt. That the cost of the malt, including the purchase price of the barley, the agreed price for malting, the interest, insurance and expense amounted to about \$30,000, of which sum Smith & Girvan paid \$12,500; of the malt so manufactured, plaintiffs shipped to Smith & Girvan about 700 bushels. Defendant levied upon 2,500 bushels of the malt manufactured out of said barley, and then in plaintiffs' possession.

Samuel Hand, for appellant. At the time the levy was made both the interest of Smith & Girvan, as pledgors and of plaintiffs as pledgees, could be reached by execution. (*Weaver v. Darley*, 42 Barb., 411; *Bakewell v. Ellsworth*, 6 Hill, 484; *Moore v. Hitchcock*, 4 Wend., 292; *Stief v. Hart*, 1 N. Y., 20; *Wheeler v. McFarland*, 10 Wend., 322; 2 R. S. [3d ed.], 464.)

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J. McGuire, for respondents. No title to the malt passed until a delivery of the same at the place named in the contract. (*Low v. Austin*, 20 N. Y., 181; *McConihe v. N. Y. E. R. Co.*, id., 495; *Cole v. Mann*, 62 id., 1; *Baily v. H. R. R. Co.*, 49 id., 70, 75; *Tyler v. Strong*, 21 Barb., 198; *Seymour v. Montgomery*, 1 Keyes, 463; 48 Barb., 402; 49 id., 407; 52 N. Y., 550.) Title would not vest until an acceptance by Smith & Girvan, as well as delivery. (*Howard v. Hoey*, 23 Wend., 350; *Lalors Hill & Denio*, 213; *Sturm v. At. M. Ins. Co.*, 63 N. Y., 77.) Smith & Girvan could have no title, legal or equitable, in the malt until a delivery, although they had made advances upon it. (*Schoonmaker v. Vervalen*, 9 Hun, 139; 14 id., 487.)

MILLER, J. The action was brought to recover the value of a quantity of malt taken by the defendant, by virtue of an execution against Smith & Girvan, from the malt-house of the plaintiffs. The question to be determined is whether legal title to the malt was in the plaintiffs, or whether the defendants in the execution, Smith & Girvan, had an interest in the same, which was the subject of levy and sale. By the contract the plaintiffs agreed to malt for Smith & Girvan a certain number of bushels of barley, which was specified, between certain dates and at a price named, and to deliver the same, as agreed upon, to Smith & Girvan, who were to receive the increase. The plaintiffs were to purchase and pay for the barley and ship the malt in quantities as directed. Provision is made for the payment of plaintiffs, with other conditions which will hereafter be considered. Aside from those not already stated, there is manifestly a contract for the purchase of the barley and manufacture of the malt by the plaintiffs which conferred title upon them until the plaintiffs were paid the price agreed upon; and we think that contract contains no other provisions which interfere with this interpretation. It is clear that the plaintiffs were to purchase the barley on their own account, and not as agents of Smith & Girvan, and that they were to pay or become responsible for the pur-

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chase price, without any regard to Smith & Girvan. Smith & Girvan were not responsible and in no way could have been held liable for the purchase of the barley by the plaintiffs or third parties; and hence title conferred by the purchase was in the plaintiffs alone.

In regard to the acceptance of the drafts of the plaintiffs by Smith & Girvan, it was only a mode of refunding to the plaintiffs the amounts paid by them, which did not confer any title to the same on Smith & Girvan, or change the nature of the contract. The provisions in regard to monthly statements and payment of the amounts due, and the payment of interest, exchange and insurance, were also intended to refund to the plaintiffs the amounts thus expended, and were not inconsistent with the ownership of the barley by the plaintiffs. These various expenses constituted a part of the price which Smith & Girvan were to pay the plaintiffs for the barley, after they had purchased and manufactured the same into malt. They were to receive a certain sum for each bushel, and these expenses, therefore, were proper items to be paid by Smith & Girvan to enable the plaintiffs to reap these profits. As to the insurance, it may be remarked that the plaintiffs would have been obliged to pay for it, unless provided for, as an indemnity against loss; and there was nothing unusual in providing also for its reimbursement by Smith & Girvan, as a part of the amount which they were to pay on the contract for the malt. If Smith & Girvan were the owners and had title to the property, then there was no occasion for any provision as to the expense of insurance.

The clause in the agreement that the plaintiffs might retain and hold, after the first day of June, 1876, a sufficient quantity of the malt to pay any notes or drafts remaining unpaid, as a security for the payment thereof until paid, which is also relied upon, had reference to an antecedent provision by which the malt was to be manufactured and delivered by that time, and was no doubt designed to restrict that provision, so that the plaintiffs could retain a sufficient quantity of the malt to indemnify themselves against outstanding

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liabilities of Smith & Girvan. Otherwise, and without this clause, the plaintiffs would have been obliged to deliver as provided.

None of the suggestions to which reference has been had tend to establish title in Smith & Girvan, or to show the intention of the parties that Smith & Girvan should be regarded as the owners. The statement of the counsel of the appellant, to the effect that after deducting the malt delivered, the plaintiffs still retained more than sufficient to secure the payment of all which was due to them, does not establish a title in Smith & Girvan which rendered the barley liable to levy and sale under execution. While the malt was in plaintiffs' possession no title passed, and although Smith & Girvan may have had an equitable interest in the same, which could be made perfect by the payment of the plaintiffs demand, it conferred no title or absolute right which could be reached by levy and sale under an execution. Such an interest might, perhaps, in an equitable action by a judgment creditor, after the return of an execution and after the plaintiffs' demand had first been satisfied, be applied in payment of the debt, but was not the subject of levy and sale. The property belonged to the plaintiffs absolutely. It was paid for by them, and they had never parted with the title. It was not held by the plaintiffs as a pledge, or otherwise than as owners of the same; and to hold that, under such circumstances, a judgment debtor could levy upon and sell the property, would sanction a rule which has no authority to support it.

We discover no ground for reversing the decision of the referee, and the judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

STEPHEN T. GORDON et al., Appellants, v. LOUIS HARTMAN,
Respondent.

The provision of the act of 1874, in reference to the Marine Court of the city of New York (§ 9, chap. 545, Laws of 1874), which requires that a notice of appeal, from an order of the General Term of said Marine Court to the Court of Common Pleas, reversing a judgment and granting a new trial, shall "contain an assent, on the part of the appellant, that if the order be affirmed, judgment absolute shall be entered against him," etc., was not repealed or abrogated by the provision of the act of 1875 (chap. 479, Laws of 1875), in reference to said Marine Court, which regulates appeals from the General Term thereof.

Where the Common Pleas affirms the order appealed from, and gives judgment absolute on the stipulation against the appellant, the judgment is final; and no appeal therefrom lies to this court.

(Argued December 2, 1879; decided December 9, 1879.)

APPEAL from judgment of the Marine Court, of the city of New York, in favor of defendant, entered upon a remittitur from the General Term of the Court of Common Pleas, in and for the city and county of New York, issued upon an affirmance by said court, of an order of the General Term of said Marine Court, which reversed a judgment in favor of plaintiff, entered upon a verdict.

The notice of appeal to the Court of Common Pleas contained an assent, that if the order appealed from was affirmed, judgment absolute should be rendered against the appellants.

James Clark, for appellants.

Peter Cook, for respondent. This court will enforce, and uphold the stipulation, given in this case. (*Townsend v. Masterson*, 15 N. Y., 587.) The order of the General Term of the Court of Common Pleas, giving plaintiff's leave to appeal, did not confer jurisdiction upon them. (*Bamberg v. Stern*, 76 N. Y., 555.)

Opinion of the Court, per EARL, J.

EARL, J. The Old Code (§ 352) did not authorize an appeal from the General Term of the Marine Court to the Court of Common Pleas from an order reversing a judgment and granting a new trial. An appeal from such an order was first authorized by the act chapter 545 of the Laws of 1874, section nine of which provides that the appeal may be taken, "provided the notice of appeal contain an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant, and on the determination of such appeal, effect shall be given by the appellate court to such stipulation, if necessary." It is claimed that the requirement of this stipulation was abrogated by section 43 of chapter 479 of the Laws of 1875. But I think it was not. That section is as follows: "The appeals authorized by law from the General Term of the said Marine Court shall hereafter be taken within twenty days after written notice of the judgment, and the notice of appeal and the undertaking to be given thereupon, shall be in the same form as upon an appeal from the Special to the General Term of the Court of Common Pleas," etc.; and then it is provided in the same section that "when the appeal is taken from an order granting a new trial on a case or exceptions, if the appellate court determines that no error was committed in granting the new trial, it may render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages, or other proceedings to render the judgment effectual, may be then and there had in a case where such subsequent proceedings are requisite."

It will be perceived that this section does not specify the cases in which the appeals may be taken. It regulates appeals then "authorized by law," and to learn what appeals were then thus authorized, we must look at the act of 1874; and there we find that an appeal from an order granting a new trial is authorized only provided the stipulation be given. Section nine of that act is not expressly repealed

Opinion of the Court, per EARL, J.

by the act of 1875, and I do not think that it was intended to be repealed, or that it was repealed by implication. Section 43 of the act of 1875 was enacted to regulate the practice upon the appeals specified and in the subsequent proceedings to give effect to the decisions upon such appeals. The general language used in reference to the form of the notice and of the undertaking is applicable to all appeals from the General Term of the Marine Court; and so far as it pertains to the notice of appeal, it must be held to apply only to what is strictly the notice of appeal, and not to the stipulation required to be inserted in the notice as a condition to the right of appeal.

Without writing more, after a careful consideration of the laws of 1874 and 1875, we are fully persuaded that there can be no appeal from an order of the Marine Court granting a new trial, without the stipulation.

The stipulation, in this case, was given, and the Court of Common Pleas affirmed the order and gave judgment absolute against the appellants upon the stipulation, and remitted the record to the Marine Court. That judgment was final and absolute, and no appeal to this court was authorized, as we have heretofore held.

The appeal must therefore be dismissed, with costs.

All concur.

Appeal dismissed.

Statement of case.

79	224
116	198
116	497
79	224
118	170
118	343

GEORGE G. SICKLES, Appellant, v. DANIEL FLANAGAN et al., Respondents.

In a case tried by the court, a finding of fact, without evidence to support it, if excepted to, presents a question of law subject to review in this court. In an action to foreclose a mortgage for \$2,500, the defense was usury. The court found that the mortgage and accompanying bond were executed to one H., not as a security, but only for the purpose of being sold to plaintiff at a discount; that they were so sold and were usurious. Defendants' evidence was to the effect that F., the mortgagor, before the execution of the bond and mortgage, applied to plaintiff for a loan of \$2,500, that plaintiff directed him to go and make a mortgage to somebody else, that he could buy it of them, and would loan the money. No terms of loan were stated, and no property specified to be mortgaged. H. held judgments against F. to the amount of about \$900. The bond and mortgage were executed to secure this indebtedness. H. also advanced thereon \$320, and it was understood that the balance realized on sale of the securities after paying the judgments and the money advanced was to be paid to F. They were offered to other parties before plaintiff purchased, and were sold to him at a discount. *Held*, that the evidence did not sustain the finding; that the defense of usury was not made out, but only as to part of the sum secured a failure or want of consideration; that the bond and mortgage were valid securities in the hands of H. for the amount of his judgments and the sum advanced by him, and to that extent, at least, plaintiff, standing in the place of H., could enforce them. As to whether plaintiff would be entitled to recover any more than the amount due H., *quære*.

(Submitted November 26, 1879; decided December 16, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage of \$2,500, executed by defendant Flanagan and wife to one Jacob Hollwegs, and by the latter assigned to plaintiff. The defense was usury.

The court found, in substance, that in May, 1874, Flanagan applied to plaintiff for a loan of \$2,500; that plaintiff told Flanagan "he could not buy a mortgage of him, but to go and make a mortgage to some one else and he would buy

Opinion of the Court, per DANFORTH, J.

it of them ;" that in pursuance of such direction the mortgage and accompanying bond were executed to Hollwegs, and delivered to him to be sold to plaintiff at a discount over and above the legal rate of interest, and were so sold ; " that the bond and mortgage never had any life or inception before the assignment thereof to the plaintiff ; that they were not given to the Hollwegs as a security, but only for the purpose of being sold to the plaintiff." And, as a conclusion of law, that they were usurious and void.

The further facts appear in the opinion.

Abel Crook, for appellant. The advance made by Hollwegs, June 13, 1874, to discharge the sheriff's levy, being without dispute agreed to be secured by the mortgage, entitled him to hold the mortgage as security to that amount. (*James v. Johnson*, 6 J. Chy., 429; *Davis v. Rogers*, 15 Mass., 389.) Hollwegs had the legal right to assign his interest, and to that extent Sickles acquired by assignment a valid title and right to enforce the mortgage. (*Crane v. Price*, 35 N. Y., 494; *Kellogg v. Adams*, 39 id., 28.)

C. H. Roosevelt, for respondents. Flanagan's affidavit did not operate as an estoppel, plaintiff having prepared it, and required him to execute it, knowing it to be false. (*N. Y. and Oswego R. R. Co. v. Van Horn*, 57 N. Y., 476; *Payne v. Burnham*, 62 id., 74; *Dinkenspiel v. Franklin*, 7 Hun, 339.)

DANFORTH, J. A finding of fact without evidence to support it, if excepted to, presents a question of law, subject to review in this court. Such is the case before us, and for that reason I think the plaintiff must succeed on this appeal.

The trial court found that the bond and mortgage never had any life or inception before they were assigned to the plaintiff ; that they were not given to Hollwegs as a security " but only for the purpose of being sold to the plaintiff." A careful reading of the testimony leads us to a different conclusion, not by reason of the weight or balance of evidence,

Opinion of the Court, per DANFORTH, J.

but because it is all one way and wholly against the finding. Two witnesses were called for the defendant—Flanagan himself and Hollwegs. Flanagan says: “I had a conversation with Mr. Sickles in the month of May. I told him I wanted to borrow some money. Says he—‘You go and make a mortgage to somebody else; I cannot buy it of you but I can buy it of them, and I will loan you the money.’ I told him I wanted \$2,500. He asked me who I would make it out to. I said I had a brother. He said had he any property? I said not much, and says he—‘I won’t give any money to any one unless—‘some responsible person.’” This is the whole of the conversation as given on the direct examination. On being cross-examined he says: “No person was present at the conversation except Sickles and myself;” and, adding to the former testimony, says: “I told him that I owed some money and wanted some money on the property that he levied on. I don’t know whether I told Sickles what property I wanted to give the mortgage on. I did not tell him how long I wanted the money for. I told him I wanted to pay my debts, of course.” “It was before the mortgage was signed and before I got the mortgage drawn, that this conversation occurred”—now this is all that occurred between the parties before the mortgage was made. It is absolutely contradicted by Sickles and in the most explicit terms. He denies that he had any conversation whatever with Flanagan, yet we must take Flanagan’s statement as true, for the question of comparative credibility is not for us to answer. But it establishes no contract,—nothing upon which usury can be predicated,—no loan of money agreed upon,—no security named,—no terms of loan suggested. Neither in conscience nor in law was any agreement made. The most that can be inferred is that the plaintiff was willing to buy a mortgage provided he could buy it at a discount, but certainly even this is not proven. It will be seen, however, that if he then contemplated usury he was, by the very necessities of the plaintiff saved from its commission. The mortgage was in fact made to Jacob Hollwegs. It is dated May

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29th, 1874, to secure \$2,500, and is payable on the 29th day of May, 1875, according to the conditions of a bond of the same date executed by the defendant Flanagan and Mary, his wife. These papers were drawn by one Pemberton. He testified that in the first place Hollwegs called upon him in reference to their preparation saying, as he testifies: "Mr. Flanagan was indebted to him. * * * That he had a judgment for a portion of the amount and Flanagan was willing to execute a bond and mortgage to secure him among the rest, that is to secure his claim, and I asked him what is the amount and he told me, I think, \$2,500." "He asked me when I would draw the mortgage;" a day was named and at the time appointed Hollwegs came again with Flanagan. Both then stated that Flanagan was indebted to Hollwegs in a certain amount, but the sum he had forgotten. He says: "The object was, in giving the mortgage to secure Mr. Hollwegs indebtedness. I don't know as there was much more said about it." "Flanagan said he was owing Hollwegs and wanted to pay him or secure him, and then the mortgage was executed." This evidence is in no respect contradicted, and Flanagan himself testifies, saying: "After the mortgage was made and recorded I gave it to Hollwegs. When I made it I owed Hollwegs money,—I don't exactly know how much. I remember after I gave the mortgage to Hollwegs the sheriff levied on my stock. Hollwegs paid money to me about that time and I paid it to the sheriff. That was after this mortgage was made and before Sickles bought the mortgage. The levy was paid by Hollwegs giving me the money for that purpose before Sickles gave the money to Hollwegs." Hollwegs says: "At the time the mortgage was made there was due to me about \$900, without the interest. I sued Flanagan and got a judgment, and I urged him to get the money and pay me, and he said he would try and do so. That was before the mortgage. When it was given he said Sickles offered to loan him money; that he would not give it to him, and he would give it to another party, and if I would take it I

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might take my claim out. The mortgage was to secure my claim, and the balance that might be realized upon the sale was to come back to him. I took it partly as security to that extent, and for the balance above my debt, that I would receive upon the mortgage, to give it back to him. I first refused to advance any money on it, but I found Mr. Flanagan so hard pressed that the sheriff was coming down Monday to make a levy. This was on Saturday, and it would be necessary for him to have that money or the sheriff would sell his cattle; it was absolutely necessary for him to have it, and he said, the mortgage is large enough and you are amply secured, and let me have it, and in that light I gave him a check for the amount to the order of Ziba Carpenter, and I advanced it because he told me so. It was understood between us that it was to be upon the mortgage. I can't give the words, but I can the result of it. I was secured by the mortgage." The witness says he had judgments at the time which were a "lien against Mr. Flanagan and his property;" that Flanagan wanted to raise money to pay off these claims and others which were against him. Ziba Carpenter was the sheriff, and the money was advanced by Hollwegs to enable Flanagan to rid himself of the levy of \$320, and Hollwegs says: "this was advanced on that mortgage June, 1874." Hollwegs had then two judgments against Flanagan, and these, with interest, and the sum advanced to the sheriff, made, on the 7th of August, 1874, \$1,267.51. This was the date of the sale and assignment of the mortgage to the plaintiff, and from the evidence thus referred to, standing uncontradicted, there can be no doubt that at this time the mortgage was a valid and available security in the hands of Hollwegs for the amount due to him. The mortgage was made to sell; the object was to raise money to pay debts, and if the creditors had been less pressing, the sheriff more lenient and Hollwegs less careful of himself and his own interest, it is easy to see that the mortgage would have been disposed of to the plaintiff or some other person under circumstances which would bring the transac-

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tion within the condemnation of the statute relating to usury. Not necessarily to Sickles, for the evidence of these three witnesses is that the mortgage was offered for sale to other parties before it was purchased by the plaintiff. As it is, the defense of usury is not made out, but only as to part of the sum covered by the condition of the bond and mortgage, a failure or want of consideration. As to the amount actually due Hollwegs from Flanagan, the plaintiff stands in the place of Hollwegs, and to that extent may enforce the collection of the mortgage. And this is so notwithstanding Flanagan participated in the negotiation which led to the sale, for the rights of Hollwegs were not thereby diverted or impaired either in his hands or in the hands of his assignee, nor could they be by any act of Flanagan short of payment. To the extent of Hollwegs' claim the mortgage was valid and whatever may have been the terms of purchase by the plaintiff, or his expectation concerning it prior to the execution of the mortgage, it would not render it invalid. If no purchaser had been found can it be doubted that Hollwegs might himself have enforced payment of his claim by a foreclosure of the mortgage? I think not. If, failing to negotiate the bond and mortgage Flanagan had demanded them back from Hollwegs and asked for a cancellation of the securities, Hollwegs might still have retained them until his claim was paid. He had, therefore, with or without the consent of Flanagan, a right to assign them; having done so, the assignee is entitled to the same remedy, and if necessary will be deemed subrogated to all his rights. Whether the plaintiff can recover more than the amount due Hollwegs it is not necessary to inquire. That will depend upon the evidence produced upon another trial. If these views are correct, the trial court erred in the finding above referred to, and for that reason the judgment of the Special and General Terms should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

**MARY ELIZABETH RICHMOND as Executrix, etc., Appellant,
v. THE NIAGARA FIRE INSURANCE COMPANY, Respondent.**

Defendant issued to O., its general agent, an open or underwriters' policy of insurance, which contained a condition, that if the interest of the insured be other than the entire and sole ownership, it must be so represented to the company, and so expressed in the written part of the policy, otherwise it would be void. O. issued to B. & Co. two certificates of insurance, which were indorsed upon the policy, upon wheat in their elevator; in one, loss if any, payable to whom it may concern; in the other, loss payable to R. Previous to obtaining the insurance R. had discounted drafts, drawn by B. & Co. upon him, receiving as security warehouse receipts of specified quantities of wheat in said elevator. After a loss B. & Co. assigned the certificates to R. In an action thereon defendant set up, as a defense, a breach of said condition. The case on appeal did not contain the evidence, but simply stated that certain facts were proved. There was no suggestion therein as to whether or not any representations were made by B. & Co., as to the nature of their interest, no request to find, and no findings upon that subject; the only exceptions were to the findings as made. The court, by whom the cause was tried, found that all the conditions of the policy had been duly kept and performed. The General Term reversed the judgment on the ground that there was a breach of this condition. *Held*, error; that it did not appear from the bill of exceptions, that this question was litigated upon the trial, and there was no exception enabling the court to consider it on appeal; that the burden of proving a breach of the condition was upon defendant; that if B. & Co., when the insurance was procured, informed O. of the nature of their interest, and he omitted to describe it in the policy, defendant would be deemed to have waived the condition, and it could not be assumed that this was not done.

It was claimed by defendant that B. & Co. had, prior to the insurance, issued warehouse receipts, covering a larger quantity of wheat than there was at the time of the insurance in the elevator, and that they had therefore no insurable interest. No fraud was claimed, and it appeared that the whole insurance was less than the value of the wheat in the elevator. The case stated that it was proved that B. & Co. were the owners of the wheat, and it was so found. *Held*, that assuming B. & Co. had parted with the title to the wheat by force of warehouse receipts, before the receipts to R. were executed, they occupied at least the position of warehousemen, and so had an insurable interest; but that the finding of ownership could not be questioned here.

The policy contained a provision avoiding it, in case the assured had at the time of insurance, or thereafter made, other insurance without the consent of the company written thereon. There was, at the time the

79	230
115	287
79	230
137	306
79	280
149	484
79	230
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155	269

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insurance in question was effected, other insurance, which was not consented to in writing. It appeared that the other insurances were effected through O., and were known to him to be in existence when the insurance in question was made. *Held*, that, under the circumstances, the issuing of the insurance by O., without noting a written consent to the other insurance, was a waiver of the provision, binding upon the defendant.

Richmond v. N. F. Ins. Co. (15 Hun, 248), reversed.

(Argued November 20, 1879 ; decided December 16, 1879.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 15 Hun, 248.)

This action was brought by plaintiff, as executrix of the will of Dean Richmond, deceased, upon two certificates of insurance issued by the underwriters' agency at Oshkosh, Wis., to Wm. M. Berry & Co. of that place, insuring them against loss by fire on wheat in the Northwestern Agency in that city.

The facts found by the court are substantially as follows :

At and prior to, May 25, 1866, William M. Berry & Co. had in their possession a building known as the Northwestern Elevator, in said city, which they used for the purpose of receiving, storing and transferring grain. At the time of effecting the insurance in question they were the owners, and had in store in said elevator, 15,811 bushels of wheat, of the aggregate value of \$26,878.70. On the 14th day of June, 1864, the defendant, the Niagara Fire Insurance Company, and three other insurance corporations, each acting and contracting for itself, issued an open policy of insurance for indorsements, known as an underwriters' policy, to A. C. Osborn of said city of Oshkosh, whereby, in consideration of one-fourth part of the respective sums to be specified as premiums, and indorsed thereon, they did each insure the said Osborn for account of the respective persons therein referred to as entitled to the benefit of said policy against loss or damage by fire to the amount of one-fourth

Statement of case.

part of the respective sums, which should be indorsed upon said policy, upon such produce and other merchandise in the vicinity of Oshkosh, as should be specified thereon, and in the certificates issued thereunder, for the benefit of the respective persons whose names should be written thereon, and to whom a certificate, authenticated by the general agent of said companies, specifying the name of the person insured, the amount and period of such insurance, the premium therefor, the goods insured and the place of their location, signed by the said Osborn, should be issued and delivered by him simultaneous with the indorsements of the risk upon such policy, in and by which they should be permitted to come in under said policy. On May 19, 1866, Berry & Co. applied to Osborn for insurance on wheat belonging to them in said elevator to the amount of \$3,000; loss, if any, payable to whom it might concern; and thereupon Osborn indorsed upon said policy the insurance asked for, and at the same time issued and delivered a certificate for the amount, in which certificate it was written that the loss, if any, should be payable to whom it might concern. On May 23, 1866, Berry & Co. applied to Osborn for a further insurance on \$2,000 on wheat in said elevator; loss, if any, payable to Dean Richmond; and thereupon Osborn indorsed upon said policy of insurance the sum so applied for, and issued and delivered a certificate of insurance as so applied for. Said Richmond, on the 12th of May, 1866, loaned to Berry & Co. \$3,000; and, as security therefor, they issued to him a warehouse receipt for wheat in said elevator, as follows:

“ NORTHWESTERN ELEVATOR, }
“ OSHKOSH, *May* 12, 1866. }

“ Received in store from Dean Richmond, twenty-five hundred bushels of wheat, subject to the order of Dean Richmond, upon the surrender of this receipt, loss by fire and heating at owner's risk.

“ 2,500 bushels.

“ [Signed]

WM. M. BERRY & CO.”

Statement of case.

On the 21st of May, 1866, Richmond loaned to Berry & Co. the further sum of \$3,000; and, as security therefor, they issued to him a warehouse receipt for 3,000 bushels of wheat in said elevator, in all respects, except as to date and quantity, the same as that above set forth. Richmond did not, in fact, supply the wheat mentioned in the receipt, nor was there any bargain and sale of the wheat to Richmond as buyer; but it was understood and intended between Berry & Co. and Richmond that he held it as security for the money advanced. At the time the receipts were issued Berry & Co. had wheat in said elevator in excess of the amounts mentioned in the receipts issued to Richmond, which was in no manner separated from the bulk of wheat which they had in store. On the 25th of May, 1866, aforesaid, the elevator, together with the wheat contained therein, was destroyed by fire. Berry & Co., after the loss, assigned the said certificates to Richmond.

The said policy, amongst other conditions, contained the following: 'If the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * or if the interest of the assured, in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise, is not truly stated in this policy, * * * if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, it must be so represented to the companies, and so expressed in the written part of this policy — otherwise the policy shall be void.' In its answer, among other defenses, defendant alleged a breach of this condition.

The further facts appear in the opinion.

A. P. Laning, for appellant. The legal effect of the transaction between Berry & Co. and Richmond was to transfer the wheat named in the receipt to the latter in trust, as security for the payment of the money advanced by him

Statement of case.

to them upon their draft. (*Yeuni v. McNamee*, 45 N. Y., 614; *Gibson v. Stevens*, 8 How. [U. S.], 384; *Gardiner v. Suydam*, 7 N. Y., 357.) Berry & Co. had an insurable interest in the property, since they held the equity of redemption subject to the pledge or mortgage, held by Richmond. (*Buffalo St. Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y., 401; *Gordon v. Mass F. and M. Ins. Co.*, 2 Pick., 249; *Phillips on Ins.*, § 287; *Grosvenor v. Atlantic F. Ins. Co.*, 17 N. Y., 391.) The condition as to the insurance, without written consent, was as matter of law waived. (*Van Allen v. F. I. S. Ins. Co.*, 4 Hun, 413; *Boehen v. W'msburgh City Ins. Co.*, 35 N. Y., 131; *Bodine v. Ex. F. Ins. Co.*, 51 id., 117; *Hayward v. Nat. Ins. Co.*, 52 Mo., 181; 14 Am. R., 400; *Pechner v. Phœnix Ins. Co.*, 65 N. Y., 195; *Dayton Ins. Co. v. Kelly*, 24 Ohio St., 345; *Conem v. H. and L. Ins. Co.*, 112 Mass., 136; *Pitney v. G. F. Ins. Co.*, 65 N. Y., 6) Berry having disclosed the real interest of his firm in the wheat to defendant's agent, the fact that it was not correctly stated in the policy was not material. (*Van Schoick v. Ma. F. Ins. Co.*, 68 N. Y., 438; *Lyc. F. Ins. Co. v. Jackson*, 83 Ill., 302; 25 Am. R., 386; *Manhat. F. Ins. Co. v. Weill*, 28 Grat., 389; 26 Am. R., 364; *Ayrault v. Pacific Bk.*, 47 N. Y., 576; *Kluender v. Lynch*, 4 Keyes, 364; *Walsh v. Kelly*, 40 N. Y., 556; *Magee v. Badger*, 34 id., 247; *Chamberlain v. Pratt*, 33 id., 47; *Hunt v. Maybee*, 3 Seld., 273; *Groot v. Gile*, 51 N. Y., 431; *Jarvis v. Driggs*, 69 id., 143; *Vanderlip v. Keyser*, 68 id., 445; *Ripley v. Ætna Ins. Co.*, 30 id., 136; *Van Schoick v. Niag. F. Ins. Co.*, 68 id., 434; *Jones v. Osgood*, 6 id., 235; *Wheeler v. Billings*, 38 id., 265; *Lefler v. Field*, 50 Barb., 407.) If no questions were asked the insured, nor the representations required in the policy ever brought to his notice by the insurer, the policy is not avoided if the representations required by the policy were not made by the insured. (*Carter v. Boehm*, 3 Burr., 1905; *Clark v. Manfr's Ins. Co.*, 8 How. [U. S.], 249; *Tyler v. Ætna Ins. Co.*, 12 Wend., 507; *Col. Ins. Co. v. Lawrence*, 2 Pet., 25; 1

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Caive's, 276; 1 J. R., 385; 11 id., 302; 9 Wend., 409; Marshall on Ins., 682-683, 730; Phillips on Ins., 64, 94; *Morrison v. Tenn. M. and F. Ins. Co.*, 18 Mo., 262; *Gates v. Madison Ins. Co.*, 1 Seld., 469; *Holmes v. Charlestown Ins. Co.*, 10 Met., 211, 214; 2 Harris [Pa.], 393; 18 Pick., 419; *Hartford Pro. Ins. Co. v. Harmer*, 2 Ohio St., 452.) The answers to the express condition, assuming that they were given in response to inquiries, were not warranties, but representations. (*Houghton v. Manfr's Mut. F. Ins. Co.*, 8 Met., 114; 2 Bennett's F. Ins. Cases, 346.)

Samuel Hand and *Spencer Clinton*, for respondent. Berry & Co. having issued warehouse receipts for more wheat than they had in the warehouse, and the receipt for which the insurance was obtained representing no proportion, the conditions of the policy were violated. (*Buff. St. Engine Works v. M. Ins. Co.*, 17 N. Y., 391.) Their interest not being truly stated in the policy it was void. (*Lascher v. N. W. Nat. Ins. Co.*, 18 Hun, 98.) The receipts given by Berry & Co. divested them of their title as owners, and they became merely bailees. (*Lucas v. Douiren*, 7 Taunt., 278; Laws 1858, chap. 326; *McCombie v. Spoder*, 1 Hun, 196; *Parshall v. Egert*, 54 N. Y., 18.) They were in no sense mortgagors, either with or without an equity of redemption, and having attorned as bailees to Richmond, who had possession, they had not even a leviable interest on execution. (*Parshall v. Egert*, 54 N. Y., 18; *Butler v. Miller*, 1 id., 496; *Baltes v. Repp*, 1 Abb. Ct. App. Dec's, 87; *Dickinson v. Puckhafer*, 1 Abb. N. P., 32; *Stewart v. Slater*, 6 Duer, 99; *Rogers v. Traders' Ins. Co.*, 6 Paige, 587.) Where a policy is made in the name of an agent to insure another named, none but the person named can prove an insurable interest. (*Russell v. N. Y. M. Ins. Co.*, 4 Mass., 82; *Graves v. Boston M. Ins. Co.*, 2 Cranch., 213.)

ANDREWS, J. The General Term reversed the judgment of the trial court on the ground that there was a breach of the

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condition in the policy which declares that "if the interest of the insured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void." The decision of the General Term proceeds upon the ground that the delivery by Berry & Co., to Richmond of the two warehouse receipts, prior to the execution of the contracts of insurance operated to divest the former of the legal title to the wheat embraced therein and to transfer it to the latter as a security in the nature of a pledge or mortgage, leaving in Berry & Co. the equitable right of redemption only on repayment to Richmond of the money advanced by him, and that the interest remaining in Berry & Co. was not therefore the entire, unconditional and sole ownership of the wheat within the meaning of the condition. This qualified interest of Berry & Co. was not expressed in the policy and the General Term in coming to the conclusion reached by it, assumes that the nature of the interest of Berry & Co. in the wheat was not represented to the insurers when the contracts of insurance were made.

It is claimed by the plaintiff that the interest of Berry & Co. in the wheat, transferred to Richmond as security merely, was an entire, unconditional and sole ownership within the meaning of the condition in question, and the case of *Manhattan Ins. Co. v. Weill* (28 Gratt. [Va.], 389) is cited in support of the view. But it is unnecessary to pass upon this question in this case as we are of opinion that it does not appear from the bill of exceptions that the question upon which the General Term decided the case was litigated upon the trial, or any exception taken which enables the court to consider it upon appeal. One of the defenses in the answer presents this defense. But it does not appear from the evidence, findings or exceptions, that it was alluded to on the trial. The case was tried by the court, without a jury. The judge made specific findings of fact and law. The case as settled does not contain the evidence

in full, but recites that certain facts were proved. There is no suggestion whether or not any proof was made of representations by Berry & Co. as to the nature of their interest, no request to find upon that subject and no finding, and the only exceptions which appear in the case are to the findings of fact and law made by the court. Upon this state of the record the question upon which the court below decided the case, was not, we think, before it. It is quite consistent with the case as presented that Berry & Co. disclosed to the company when the insurance was effected the exact nature of their interest. The underwriter's policy, upon which the insurance was indorsed, does not contain any reference to or description of the interest or title of Berry & Co. in the wheat. If the insured when the insurance was procured informed Osborn, who was the general agent of the underwriters, of the nature of their interest, and he omitted to describe it in the policy but delivered the certificates to Berry & Co. without having made such entry, the companies would, in accordance with numerous authorities, be deemed to have waived the condition requiring that the interest of the assured, if not an entire, unconditional and sole ownership should be expressed in the policy. (*Trustees, etc., v. Brooklyn Fire Ins. Co.*, 19 N. Y., 305; *Sheldon v. Atlantic Ins. Co.*, 26 id., 460; *Pitney v. Glen's Falls Ins. Co.*, 65 id., 6; *Van Schoick v. Niagara Ins. Co.*, 68 id., 434.) The burden of proving a breach of the condition was upon the defendant. It cannot be assumed that Berry & Co. did not correctly represent the nature of their title in the absence of any proof on the subject, and especially in view of the finding of the judge on the trial that the insured had duly kept and performed all the conditions of the policy on their part.

But other grounds are insisted upon as justifying the reversal of the original judgment. It is claimed that Berry & Co. had no insurable interest in the wheat in the elevator. This point proceeds upon the assumption that the insured had, prior to the insurance in question, issued warehouse

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receipts covering a larger amount of grain than was in the elevator when the insurance was effected, and that their title to the wheat having passed to the holders of the receipts they had no interest left, which was the subject of insurance. The defendant did not claim on the trial that there was any fraud on the part of Berry & Co. which avoided the insurance. It also appears that the whole insurance on the wheat in the elevator was less than its value. Assuming that Berry & Co. had parted with the legal title to the wheat by force of warehouse receipts issued by them before the receipts to Richmond were executed, and that the latter therefore acquired no interest in any of the wheat in the elevator by virtue of the receipts issued to him, it would not follow that Berry & Co. had no insurable interest in the property. They occupied at least the position of warehousemen, in possession of the wheat, and, as bailees, had duties in respect to the care and custody of the property, and an interest which was the subject of insurance. (1 Phillips on Insurance, § 191.) The insurance was not on wheat owned by Richmond, so that if he owned none, there would have been no insurable subject, but was on wheat in bulk, in the elevator, without any specification of the persons in whom the title was vested. But there is another answer to the objection we are now considering. There is no finding that Berry & Co. were not the owners of the wheat in the elevator when the insurance was effected. On the contrary the case states that it was proved that Berry & Co. were the owners and the finding is that they were such owners, and there is no finding that any receipts had been issued except those issued to Richmond. The defendant did not request any finding in respect to other receipts issued by Berry & Co. and, if we look into the evidence, it does not appear that the other receipts referred to related to the wheat in the elevator at the time of the insurance. But it is sufficient to say that the finding of ownership is supported by the evidence and cannot be questioned in this court, and the point that Berry & Co. had no insurable interest in the property cannot be maintained.

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There was, at the time the insurance in question was effected, other insurance on the property which was not consented to in writing by the underwriters on the policy, and it is claimed that this avoids the policy, under the provision contained therein that it should be void "if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon." It was proved and found that Osborn was the general agent at Oshkosh of the defendant and other companies which issued the open, or underwriter's policy, under which, by indorsements thereon and certificates issued, insurance was to be effected in favor of persons applying for insurance to the agent in whose name the policy was issued. It also appears that the other insurances mentioned were effected through Osborn as agent for the companies issuing the policies and were known to him to be in existence when the insurance in question was made. Under these circumstances, the issuing by Osborn of the policies sued upon without noting thereon the written consent of the defendant to the other insurance, was a plain waiver by him, binding the defendant, of the provision in question, under the authorities already cited. This case is much stronger than many of the cases where companies have been held to have waived conditions. Here the agent was the person named as the insured in the body of the open policy. It was clearly contemplated that he was to retain the custody of the instrument and create insurances in favor of third persons by issuing certificates of the fact. It was the plain duty of Osborn to have indorsed on the open policy the consent of the underwriters to the other insurance, of which he was advised, and his omission to do this was the omission of the general agent of the defendant and the other companies in whose behalf the insurance in question was made. It would be in the highest degree inequitable to permit the default of the defendant's agent, under such circumstances, to defeat a recovery in this action.

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There are no other questions requiring examination. The result is that the order of the General Term should be reversed and the judgment for the plaintiff on the trial be affirmed.

All concur.

Order reversed, and judgment affirmed.

**JAMES KIRKPATRICK as Administrator, etc, Respondent, v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.**

A railroad corporation owes a duty, to one employed upon one of its engines, to see that the engine is fit and proper for his use in the performance of the labor he has undertaken; this duty is not discharged simply by employing fit and competent agents to supervise the engine, and see that it is in fit condition; any negligence on the part of such agents, in the performance of their duties in this respect, is the negligence of the corporation. In an action to recover damages for alleged negligence causing the death of K., plaintiff's intestate, it appeared that the death was caused by the explosion of the boiler of a locomotive upon which K. was employed as a fireman. Plaintiff's evidence tended to show that the engine was infirm and weak, was frequently, and from necessity, taken to the repair shops for repairs; that it was unable to hold water, or sustain a full head of steam. *Held*, that the question of defendant's negligence was one of fact for the jury.

Upon the cross-examination of S., a witness for plaintiff, who had given material testimony for him, and who had been in defendant's employ, he was asked if he was discharged for inefficiency and drunkenness; if he was discharged at all; and if O., his "immediate boss," did not assign these reasons for discharging him, to all of which he answered, "No." O. was called by defendant's counsel, who offered to prove by him, that he became aware that S. was in the habit of being intoxicated, and neglected his duty, and that he was discharged for that reason. This was excluded. *Held*, no error; that the fact of his discharge was immaterial; that if the discharge was for inefficiency or drunkenness, this could not be proved by way of impeachment, and was matter collateral to the issue, as to which the answers of S. were conclusive; that if such grounds for the discharge were communicated to S., it might lay the

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foundation of an inquiry as to his feelings toward defendant; but as defendant did not offer to show this, and as it was not disclosed on the trial that the offer was to show a hostile feeling, the question could not be presented here.

(Argued December 2, 1879; decided December 16, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered on a verdict.

This action was brought to recover damages for alleged negligence on the part of defendant, causing the death of Richard Kirkpatrick, plaintiff's intestate.

The deceased was killed by the explosion of the boiler of a locomotive, upon which he was employed as a fireman.

The further facts appear sufficiently in the opinion.

Frank Loomis, for appellant. It was error to exclude the offer to prove by Overpugh the facts denied by Scott. (*Starks v. People*, 5 Den., 106.) Defendant having sent out the engine in a condition deemed by a competent and faithful man safe, to be run at a pressure of 125 pounds, was not liable. (*Leonard v. Collins*, 70 N. Y., 90; *Reynolds v. N. Y. C. and H. R. R. Co.*, 58 id., 248.) It was for plaintiff to establish affirmatively that the accident occurred with or within the pressure authorized by the defendant. (*Cordell v. N. Y. C. and H. R. R. Co.*, 75 N. Y., 330.) A master is not responsible to a servant for the acts of a fellow-servant, to whom there has been no delegation of power and control of the business. (*Flike v. B. and A. R. R. Co.*, 53 N. Y., 549; *Corcoran v. Holbrook*, 59 id., 517; *Malone v. Hathaway*, 64 id., 65.) Defendant having furnished a proper, perfect and safe machine, when used in accordance with its instructions, and the accident being due to the violation of such instructions by Lansing, no recovery can be had. (*Warner v. Erie R'w. Co.*, 39 N. Y., 468; *Laning v. N. Y. C. R. R. Co.*, 49 id., 521; *Chapman v. Erie R. Co.*, 55 id., 579; *Sammon v. N. Y. and H. R. R. Co.*, 62 id., 251.)

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E. Countryman, for respondent. The court properly denied the motion for a nonsuit, and submitted the case to the jury. (*Kirkpatrick v. N. Y. C. and H. R. R. R. Co.*, 6 N. Y. W. Dig., 105; *Stephenson v. Jewett, Rec'r*, 16 Hun, 210; *Avilla v. Nash*, 117 Mass., 318; *Bernhard v. R. and S. R. R. Co.*, 1 Abb. Ct. App. Dec., 131, 134; *Weber v. N. Y. C. and H. R. R. R. Co.*, 58 N. Y., 451, 455; *Ernst v. H. R. R. R. Co.*, 35 id., 10, 40; *Morrison v. N. Y. C. and H. R. R. R. Co.*, 63 id., 643; *Powell v. Powell*, 71 id., 71.) Defendant was bound to furnish to the deceased, as its employe, at the out-set, a safe and suitable engine for use in his employment; and it would be liable for all injuries resulting from defect in the machine, which its officers or agents, in the exercise of proper diligence, knew of, or ought to have known. (*Laning v. N. Y. C. R. R. Co.*, 49 N. Y., 521, 532; *Stephenson v. Jewett, Rec'r*, 16 Hun, 210; *Chicago, etc. R. Co. v. Shannon*, 43 Ill., 338, 345; *Toledo, etc. R. Co. v. Moore*, 77 id., 218, 224; *Booth v. Boston, etc. R. Co.*, 73 N. Y., 38, 41; *Berea Stone Co. v. Kraft*, 31 Ohio St., 287; *Corcoran v. Holbrook*, 59 N. Y., 517; *Brickner v. N. Y. C. R. R. Co.*, 49 id., 672; *Flike v. B. and A. R. R. Co.*, 53 id., 549, 553; *Spelman v. Fisher Iron Co.*, 56 Barb., 151; *Bessex v. Chicago, etc. R. Co.*, 45 Wis., 477; *Weston v. N. Y. El. R. Co.*, 73 N. Y., 595; *Keegan v. West. R. Co.*, 8 id., 175; *Mehan v. Syr., etc. R. Co.*, 6 N. Y. W. Dig., 363; *Plank v. N. Y. C. and H. R. R. R. Co.*, 60 N. Y., 607; *Ryan v. Fowler*, 24 id., 410, 414; *Shauny v. Androscoggin Mills*, 66 Me., 420; *Gilman v. East R. Co.*, 13 Allen, 433, 440; *Huddleston v. Lowell M. Shop*, 106 Mass., 282, 285; *Wedgewood v. Chicago, etc. R. Co.*, 41 Wis., 478; 41 id., 44; *Ford v. Fitchburg R. Co.*, 110 Mass., 240, 260; *Snow v. Housatonic R. Co.*, 8 Allen, 441, 445; *Cayzer v. Taylor*, 10 Gray, 275; *Haskins v. Stand. Sugar Refinery*, 122 Mass., 400, 404; *Brabbitts v. Chicago, etc. R. Co.*, 38 Wis., 289.) The question of contributory negligence on the part of the deceased was also properly submitted to the jury. (*Mehan v. Syr.*,

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etc. R. Co., 73 N. Y., 585; *Chicago, etc. R. Co. v. Bayfield*, 37 Mich., 205; *Paterson v. Pittsburgh, etc. R. Co.*, 76 Penn., 389, 393.) The court properly refused to charge that if the negligence of the engineer merely contributed to the accident, the plaintiff could not recover. (*Shauny v. Androscoggin Mills*, 66 Me., 420, 426; *Sprong v. B. and A. R. Co.*, 58 N. Y., 56, 59; *Flike v. B. and A. R. Co.*, 53 id., 550, 555; *Booth v. B. and A. R. Co.*, 73 id., 38.) Only ordinary and reasonable diligence was required on the part of the deceased. (*Leonard v. Collins*, 70 N. Y., 90; *Mehan v. Syr., etc. R. Co.*, 6 N. Y. W. Dig., 363; 73 N. Y., 585; *Gibson v. Erie R. Co.*, 63 id., 449.) The court properly rejected the offer to impeach the witness, Scott, by contradicting his testimony, that he had never been discharged from defendant's service for inebriety and neglect of duty. (*Gale v. N. Y. C. and H. R. R. R. Co.*, 76 N. Y., 594; *Carpenter v. Ward*, 30 id., 243; *Kobbe v. Price*, 14 Hun, 55; *Plato v. Reynolds*, 27 N. Y., 586; *Howard v. City F. Ins. Co.*, 4 Den., 502; *Gaudolpho v. Appleton*, 40 N. Y., 533; *Laurence v. Barber*, 5 Wend., 301; *Rosenweig v. People*, 63 Barb., 634; *Cook v. Spaulding*, 52 N. Y., 662; *Crounse v. Fitch*, 1 Abb. Ct. App. Dec., 475; *Eames v. Whittaker*, 123 Mass., 342; *Combs v. Winchester*, 39 N. H., 13, 16; *Hildeburn v. Curran*, 65 Penn., 59, 63; *At'ty-Gen'l v. Hitchcock*, 1 W. H. & G., 91, 99; *Ross v. Ackerman*, 46 N. Y., 211; *Moore v. People*, 53 id., 639.)

DANFORTH, J. The appellant first objects that the trial court erred in excluding evidence, from the witness Overpugh, tending to contradict testimony given by Scott, one of plaintiff's witnesses. Scott's testimony was important. He had been in the defendant's employ, and for a time the locomotive in question was under his care. If his evidence was truthful it was damaging to the defendant, for it showed that the engine was unfit for use, and it was quite reasonable for the defendant's counsel to test as they best could, his credibility. For that purpose he was asked on cross-exami-

nation, whether he "was discharged by the defendant for inefficiency and drunkenness" — "whether he was discharged at all" — whether he had been "guilty of inefficiency," or "whether his immediate 'boss' Overpaugh did not assign these reasons for dismissing him," to all of which questions the witness answered, "no." Overpaugh was called by the defendant and asked "if at any time he became informed of unfaithfulness, and habits of being intoxicated in Mr. Scott." On plaintiff's objection this question was excluded, and properly, for however answered, it would of itself be unimportant. The defendant's counsel then offered to prove that the witness "Overpaugh became aware that Scott was in the habit of being intoxicated and neglecting duty in his department, and they discharged him for that reason." This was also excluded, and herein the defendant alleges error. But there is no error. The evidence if received would have shown, 1st, that Scott was discharged; 2d, that he was discharged for inefficiency and drunkenness, but it would not have tended to establish that these reasons had been communicated to Scott. That he was discharged, was so far as his character was concerned, unimportant. It left no stain upon it; for it is impossible not to know that a large corporation whose need of service fluctuates with the general business of the community, may require at one time fewer laborers and servants than at another, but to be discharged on account of intoxication and neglect of duty would be another matter, not to be proved by way of impeachment but if communicated to Scott, might lay the foundation for an inquiry as to his present feelings towards the company, and the question addressed to Scott was to that effect, but such was not the question put to Overpaugh, nor did the defendant offer to show that such reasons were communicated to Scott. As to that he would have gone uncontradicted even, and as to the rest, it related to matter collateral to the issue, and the defendant was bound by the answer given by Scott. It is now urged that the evidence would have indicated a hostile feeling towards the defendant, but it was not

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so stated at the trial, nor was this object then disclosed. For this reason, if for no other, the objection on that ground is now unavailing.

It is next objected that the court erred in refusing to dismiss the complaint. That the plaintiff's intestate came to his death by reason of injuries received from the explosion of a locomotive engine belonging to the defendant and while he was in its employ is not denied. It was the duty of the defendant to see to it that the engine furnished the intestate was fit and proper for his use in the performance of the labor he had undertaken. The questions thus involved have been so fully and frequently discussed and passed upon by this court, that their further consideration is quite unnecessary; (*Laning v N. Y. C. and H. R. R. R. Co.*, 49 N. Y., 521); and the same case contains an answer to the position of the defendant expressed in various forms, that they "have performed that duty by employing fit and competent agents to supervise the engine and see that it was in fit condition." Such agents must indeed be employed, but any negligence on their part in respect to the engine was equally the negligence of the defendant. There was in this case evidence proper for submission to the jury, and upon which they might answer whether this duty had been discharged; whether there was such negligence in respect to the engine as would render the defendant liable. It was infirm and weak, it was frequently and from necessity taken to the repair shops for treatment, and whether from natural infirmity or age, or overwork, or the misapplication of mechanical contrivances, it was unable to hold its water, or sustain a full head of steam. It cannot be necessary to itemize or restate the evidence. It was in substance the same as on the former trial. It was then analyzed and examined with great care by the learned Supreme Court at General Term, in determining whether it was sufficient for the consideration of a jury. It has, in consequence of the exception we are now considering, been again criticised and weighed by the same court. Upon each occasion the views of the court have been expressed

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in writing, and the conclusion reached, that the evidence presented questions proper to be submitted to the jury, and upon which they might properly find the facts constituting negligence on the part of the defendant. In that conclusion we concur. It is also objected that the court erred in various particulars in its charge to the jury. We have examined each one of them, and find no error. The charge was carefully presented, and is fully warranted by numerous decisions in our courts. To sustain any of the exceptions to it, we should be obliged to abandon principles of law which have hitherto been deemed well settled.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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118	555

DWIGHT BEEBE, Respondent v. HERMAN L. ESTABROOK et al., Administrators, etc., Appellants.

Under the provision of the statute of distribution in reference to advancements (2 R. S., 97, § 76), the descendants of a child of an intestate, who died before him, are entitled, on the final distribution of his estate, when it consists exclusively of personal property, to the benefit of advancements made by him in his life-time to his other children, and such advancements are to be taken into consideration in determining the distributive shares.

The word "children," as used in said provision, includes all the descendants of the intestate entitled to share in his estate.

The provisions of said statute and of the statute of descents on the subject of advancements (1 R. S., 752, § 23) are to be taken and construed together, as the two statutes are in *pari materia*.

(Argued December 1, 1879; decided December 16, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment, entered upon the report of a referee. (Reported below, 14 Hun, 523.)

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The nature of the action and the facts are set forth sufficiently in the opinion.

J. McGuire, for appellants. When a parent gives or advances a child money or property, it is a question of intention whether it is designed as an absolute gift, or given with a view to a portion or settlement in life, and such intention must prevail. (*Proseus v. McIntyre*, 5 Barb., 424; *Jackson v. Matsdorf*, 11 J. R., 91; *McRoe v. McRoe*, 3 Bradf., 199.) There is a presumption that when a parent so gives it is to be deemed an advancement. (*Scarvin v. Scarvin*, 1 Y. & C., 65; 2 Story's Eq. Jur., §§ 1202, 1203.) Such presumption may be met and rebutted by proof. (5 Barb., 424.) The subject of advancements is regulated by the statute of distributions, and depends upon the construction of such statute in connection with the question of the intestate's intention. (*Terry v. Dayton*, 31 Barb., 519.) A gift to a grandchild is not an advancement. (*Shiver v. Brock*, 2 Jones L. R. [N. C.], 137; 4 Kent's Com. [m. p.], 471.) A note taken by a parent on an advancement of money or sale of property to a child is evidence of a debt. (4 Kent's Com., 418-419.) Whether the sums given were advancements or gifts is solely a question of intention, and declarations are admissible to show such intent. (*King's Case*, 6 Whart., 370; 51 Barb., 612; 4 Abb., 5, 6.)

Erastus P. Hart, for respondent. The plaintiff and the infant defendants, as grandchildren of the intestate, are within the doctrine and statutes concerning advancements, and entitled to the benefits thereof. (R. S., pt. 2, chap. 6, tit. 3, §§ 76, 77, 78 [2 R. S., p. 97]; *id.*, chap. 2, tit. 2, §§ 23, 24, 25, 26 [1 R. S., p. 754]; 2 *id.*, p. 96, § 75, sub. 1; 74 Penn. St., 42-46; 1 Ep. Ab., 381, B. pl., 6, 382; B. pl., 8, 9, 10, 11; *Wyth v. Blackman*, 1 Ves. Sen., 196; 2 Vern., 106; S. C., Ambler, 555; *Royle v. Hamilton*, 4 Ves., 437; 8 De G., McN. & G., 480; 4 Kent's Com., 419; 1 *id.*, 472; 15 J. R., 380; 14 Mass., 92; *Walton v. Willis*,

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1 Dallas, 351; *Herscha v. Brennan*, 6 S. & R., 2; *Hughes' Appeal*, 7 P. F. Smith, 179; *Powers' Appeal*, 63 Penn. St., 443; *Terry v. Dayton*, 31 Barb., 519; R. S., pt. 2, chap. 2, tit. 2, § 23 [1 R. S., p. 754].) The declarations testified to by the heirs ought not to be considered on this appeal. (*Genet v. Sawyer*, 61 Barb., 211; *Bennett v. Austin*, 5 Hun, 537; *Le Clare v. Stuart*, 8 id., 127.)

ANDREWS, J. This action is brought for an accounting and distribution of the estate of Hobart Estabrook, deceased, who died intestate on the 18th day of May, 1872, leaving his widow him surviving and five sons and a grandchild, the daughter of a deceased daughter of the intestate, and a great granddaughter the daughter of a deceased grandchild whose mother, also a daughter of the intestate had died in his lifetime, his only descendants. The intestate left no real estate, but personal property only. Prior to his death he had given various sums to his children. He gave to each of them on their marriage the sum of \$500, and in 1867 he gave to each of his sons the sum of \$2,000 and in 1872, a few weeks before his death, an additional sum of \$3,000.

It is found by the referee that the several sums given by the intestate to the sons were advanced to them respectively as a portion of his estate with a view to their settlement in life and were chargeable to them in the final settlement of the estate as a part of their distributive shares, not only as between themselves, but also as between them and the descendants of their deceased sisters. This presents the principal question in this case, viz. : whether advancements made by a father in his life-time to his children are, on the final distribution of his estate in case of intestacy, when the estate consists exclusively of personal property, to be taken into account in determining the distributive shares of grandchildren or other descendants of children of the intestate who had died before him, or, in other words, are such descendants entitled to claim the benefit of advancements made by the intestate to his children in the settlement of his estate.

This question depends upon the construction of the statute in respect to advancements. The right to charge advancements made by an intestate to his children against their distributive shares in his estate depends upon positive law, and the statute regulates the right and prescribes the circumstances and limitations under which the right exists. The seventy-sixth section of the statute of distributions (2 R. S., 97) is as follows: "If any child of such deceased person shall have been advanced by the deceased by settlement or portion of real or personal estate, the value thereof shall be reckoned with that part of the surplus of the personal estate which shall remain to be distributed *among the children*, and if such advancements shall be equal or superior to the amount which, according to the preceding rules, would be distributed to such child as his share of such surplus and advancement, then such child and his descendants shall be excluded from any share in the distribution of such surplus." The seventy-seventh section declares that if such advancement shall not be equal to such amount, such child or his descendants shall be entitled to receive so much as shall be sufficient to make all the shares of all the children in such surplus and advancement to be equal as near as can be estimated. The seventy-eighth section declares that the maintaining or educating, or the giving of money to a child without a view to a portion or settlement in life, shall not be deemed an advancement, and that the two preceding sections shall not apply to any case where there shall be any real estate of the intestate to descend to his heirs.

This case is governed by these provisions of the statute. The argument that a grandchild cannot, in the distribution of the estate of an intestate have the benefit of advancements made by him to his immediate children, is founded upon the language of section seventy-six, that such advancements are to be reckoned with that part of the surplus of the personal estate "which shall remain to be distributed among the children," and it is claimed that the word *children* is to be taken in its popular sense as referring to the immediate offspring

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of the intestate, and that it is only as between the immediate children of the intestate that the question of advancements can be considered in making distribution. We are of opinion that this is not the true sense of the statute, and that the word *children* in the section quoted is used to designate all the descendants of the intestate entitled to share in the distribution.

The seventy-sixth section was a revision of the prior statute upon the same subject (1 R. L., 313, § 16), and the prior statute was nearly a literal transcript from the English statute 22 and 23 Car., II. The revisers changed the phraseology of the statute of 1813, but they say in their note that they did not intend to make any alteration in principle. The sixteenth section of the act of 1813 clearly gives to grandchildren the benefit of advancements made by the intestate to his immediate children. It declares that distribution of the personal estate of the intestate (deducting debts, etc.) shall be made amongst the wife and children, or children's children, one-third to the wife of the intestate, "and all the residue by equal portions to and amongst the children of such person dying intestate and such persons as legally represent such children (in case any of said children be then dead) other than such child or children who shall have any estate by settlement or shall be advanced by the intestate in his life-time by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution shall be made," and if the advancement is not equal to such share, provision is made for making up the deficiency. It will be seen that by this statute both children and the representatives of children were to have the benefit of advancements. In *Smith v. Smith* (5 Ves., 721), the question was raised by a son of a younger son of the intestate whether the eldest son was chargeable with a certain sum laid out by the intestate in repairs of houses which descended to the eldest son as heir. The court decided that the money so laid out could not be considered an advancement, but it was not suggested that the grandson could not raise the question.

Construing the seventy-sixth section of our statute in view of the prior law and of the declared intention of the revisers that there was no intention to change it in principle, we should not expect to find a change so material as that which is contended for by the appellants. But there are strong and, we think, conclusive reasons to be drawn from a consideration of the general spirit and design of our statutory system for the distribution of the estates of intestates, and of cognate provisions of the statute, against the construction of the seventy-sixth section which the appellants claim. The general principle pervading the statute of distribution and descents is that there shall be equality between the children of the intestate and the descendants of deceased children *per stirpes*. If the daughters of the intestate had survived him, there could have been no question of their right to an account of advancements made by him to the sons, and the principle of equality of distribution would seem to require that their descendants should stand in their place. The word *children* may be construed in a collective sense as embracing descendants when the sense and reason of a statute or of a deed or other instrument justifies it. (4 Kent, 419; *Provitt v. Rodman* 37 N. Y., 42, and cases cited.) It is claimed that it must be construed to have been used in its popular sense in the section in question, for the reason that the seventy-fifth section discriminates between children and the representatives of children, by using the latter phrase when grandchildren or other more remote descendants are intended. There is some force in this view, but we think it does not overthrow the strong presumption derived from a consideration of the general policy of equality of distribution, indicated by the statute. By the same argument it might be proved that grandchildren were not, under the Statute 22 and 23, Car. II, entitled to share at all in the distribution of an intestate's estate where the intestate left no wife surviving, for the seventh section of that statute declares that in case there be no wife "then all the said estate to be distributed equally to and amongst the children," making no

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mention of the representatives of a child, although that phrase is used in previous sections of the act.

But there is another consideration which seems to render it clear that the word *children* in the seventy-sixth section was intended to embrace grandchildren and other descendants of the intestate. The twenty-third section in the statute of descents (1 R. S., 752) also contains a provision on the subject of advancements, as follows: "If any child of an intestate shall have been advanced by him by settlement or portion of real or personal estate or of both of them, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal estate of such intestate descendible to his heirs and to be distributed to his next of kin according to law; and if such advancements, be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased as above reckoned, then such child or descendants shall be excluded from any share in the real and personal estate of the intestate." This section furnishes the only rule for charging advancements where real estate is left by an intestate. The provisions relating to advancements contained in the statute of distribution, by the express terms of the seventy-eighth section, are inapplicable in such case. Where an intestate leaves real estate, then, by the twenty-third section advancements, whether in real or personal estate, are to be reckoned as part of the real and personal estate of the intestate "descendible to his heirs and to be distributed to his next of kin." Plainly under this section all descendants of the intestate entitled to take under either the statute of descents or of distribution, however remote from the intestate, are to have the benefit of advancements if the case is one to which this section applies, viz.: where the intestate left real estate descendible to his heirs. If therefore the intestate in this case had left real estate to pass by descent, the descendants of his two daughters would have been entitled to the benefit of the advancements to the sons irrespective of the value of such real estate. It cannot reasonably be

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supposed that the Legislature intended to prescribe a different rule in the two cases, and to exclude the grandchildren from the benefit of advancements where the estate consisted of personal property exclusively, and give them such benefit when the intestate left real estate, however small its value might be. The two statutes are *in pari materia* and are to be construed together. It is to be assumed that the Legislature intended to make a consistent and harmonious system and that the same policy of admitting grandchildren to share in the benefit of advancements existed in enacting both statutes. We think the seventy-sixth section of the statute of distributions is to be construed as if the word *descendants* had been used in place of *children*, and that the clause prescribing that advancements should be reckoned with that part of the surplus of the personal estate "which shall remain to be distributed among the children" was inserted to exclude any inference that the widow was to have any benefit therefrom, and to confine such benefit to the descendants of the intestate.

It is claimed that the evidence did not justify the finding that the sums given by the intestate to his sons in 1867 and 1872 were intended as advancements within the statute. The gift of \$500 made by the intestate to each of his children on their marriage was clearly intended as an advancement. The testator entered the amount against each child in a book kept by him as so much given to each as a portion of his estate and took receipts from them expressing that fact. The gift of 1867 was entered against each of the sons in the same book and on the same page on which the entries of the previous gift were made in the handwriting of one of the sons with whom the father was then living. He was then nearly eighty years of age but the evidence authorizes the inference that he had possession of the book and knew of the entries made by his son therein and adopted them as his own. The gift of 1872 was a short time only before the intestate's death. It would not be useful to recapitulate the facts bearing upon the question whether these gifts were intended as

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absolute gifts and not to be reckoned as advancements. It is sufficient to say that the presumption of law is that they were intended as advancements, (4 Kent, 418; 1 Younge & Collyer, 65; Story's Eq. Jur., §§ 1202, 1203), and this presumption was not rebutted by any evidence which made it the duty of the referee to find that they were not so intended.

The judgment should be affirmed.

All concur.

Judgment affirmed.

79	254
110	518
79	254
118	442
79	254
122	97
79	254
126	192

MARIETTA R. STEVENS et al., Executors, etc., Appellants,
v. MARGARET M. BRENNAN, Administratrix, etc., Re-
spondent.

Where a sale of goods has been induced by fraud on the part of the vendee, the vendor may reclaim and retake them from the possession of any one, except a transferee in good faith, and for a valuable consideration paid at the time of the transfer.

A transfer by the fraudulent purchaser, as security for or in payment of a precedent debt, does not make the transferee a *bona fide* purchaser within the rule, so as to enable him to hold the goods against the original vendor.

In a suit by such vendor to recover the goods from one claiming title under the fraudulent vendee, the burden is upon the latter of showing that he is a purchaser in good faith and for value.

H. Bros., induced by fraudulent representations of S., sold to him a quantity of furniture, which was retaken by B., defendant's intestate, as sheriff, by virtue of a requisition in an action of replevin, brought by the vendors against the fraudulent vendee. In an action for the alleged unlawful taking and conversion of the property, plaintiffs' testator claimed title under a bill of sale from S. and wife which recited a consideration. No other proof of consideration was given. Defendant proved by the wife of S. that no consideration was paid at the time the bill of sale was executed, and the only inference if any which could be drawn from the testimony was, that the bill of sale was taken in payment or as security for a precedent debt. *Held*, that the complaint was properly dismissed; that if the recital in the bill of sale was any evidence as against the sheriff or H. Bros., the evidence of Mrs S. destroyed any presumption arising therefrom.

79 254
77 AD'283

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Plaintiff's counsel asked to go to the jury on the question of possession at the time the goods were taken by the sheriff, which was denied. *Held*, no error; that the question as to the possession of the goods was not important, as, if in possession of plaintiffs' testator, the sheriff, acting for H. Bros., had a right to take them unless the former was a *bona fide* purchaser for value.

To the question asked Mrs. S. as to whether any money was paid by plaintiffs' testator when the bill of sale was given, plaintiffs' counsel interposed a general objection, which was overruled and exception taken. *Held*, that the exception did not present the question as to the competency of the witness to testify under section 399 of the Code of Procedure.

A general objection to a question can only be considered as applying to the competency or materiality of the point sought to be proved, and not to the competency of the witness to testify upon the subject.

(Argued December 8, 1879; decided December 16, 1879.)

• APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York in favor of defendants, entered upon an order overruling exceptions, and directing judgment on an order dismissing the complaint on trial.

This action was brought originally by Paran Stevens, as plaintiff, against Matthew T. Brennan, as sheriff, to recover damages for the alleged unlawful taking and conversion of a quantity of furniture. Both of the original parties having died during the pendency of the action, the present parties were substituted.

The furniture in question was sold by Herter Bros. to E. A. Stevens; the sale was induced by fraudulent representations on the part of Stevens as to his responsibility. On learning of the fraud Herter Bros. demanded the property, and on refusal of Stevens to surrender it, commenced an action of replevin. Brennan, as sheriff, under and by virtue of a requisition issued in said action, took possession of the property; which was the taking complained of.

Plaintiff claimed title under a bill of sale from E. A. Stevens and his wife, which expressed a consideration of \$2,500.43. The premises in which the furniture then was were leased by said E. A. Stevens of Paran Stevens. A

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formal surrender of the lease was executed the day the bill of sale bears date. At that time said lessee owed two months rent. No proof of any consideration for the bill of sale was given on the part of plaintiff, other than the recital therein. Mrs. E. A. Stevens, as a witness for defendant, was asked whether she or her husband received any money at the time the bill of sale was given. This was objected to generally. Objection overruled and exception. She answered that they did not, and in substance that no consideration was paid by Paran Stevens at the time.

At the close of the evidence defendant's counsel moved for a dismissal of the complaint. Plaintiffs' counsel asked to go to the jury on the question of possession of the property at the time it was taken by the sheriff. This the court refused, and granted defendant's motion, to which rulings plaintiffs' counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

John E. Burrill, for appellants. The replevin proceedings were no justification for taking the property in question as at that time it was in the actual possession of plaintiffs' testator. (*Otis v. Williams*, 70 N. Y., 208; *Bullis v. Montgomery*, 50 id., 352; *King v. Orser*, 4 Duer, 431; *Hurkins v. Kelly*, 1 Abb. [N. S.], 63.) If the replevin proceedings were a justification defendant was entitled to the verdict, if not plaintiffs were entitled to recover. In neither case could the question of title be tried. (*King v. Orser*, 4 Duer, 434-438; *Otis v. Williams*, 70 N. Y., 208.)

H. W. Bookstaver, for respondent. Herter Bros.' title to the property, notwithstanding the delivery, was good as against every one but a *bona fide* purchaser for a valuable consideration. (*Root v. French*, 13 Wend., 570; *King v. King*, 8 Bosw., 603; *Tallman v. Turck*, 26 Barb., 167; *Nichols v. Michael*, 23 N. Y., 264; *Wilson v. Foree*, 6 J. R., 110; *Acker v. Campbell*, 23 Wend., 372; *Russell v. Minor*, 22 id., 659.) If it is assumed that the consideration of the

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bill of sale was past due rent, then Paran Stevens was not a *bona fide* purchaser for value so as to defeat the rights of Herter Bros., the owners of the property. (*Weaver v. Barden*, 49 N. Y., 286; *Laurence v. Clark*, 36 id., 129; *Bay v. Coddington*, 20 J. R., 637; *Acker v. Campbell*, 23 Wend., 372; *Manhattan Co. v. Everton*, 6 Paige Ch., 457; *Tallman v. Turck*, 26 Barb., 167; *Bullis v. Montgomery*, 50 N. Y., 352; *Edgerton v. Ross*, 6 Abb., 189; *McCann v. Thompson*, 13 How., 380; *Aldrich v. Ketcham*, 3 E. D. Smith, 577.) The plaintiffs in the replevin suit—Herter Bros. having rescinded the contract for the admitted fraud—were entitled to take the goods from any one, except one who had acquired a complete title by purchase, for a valuable consideration, and by actual and exclusive possession. (*Sturtevant v. Ballard*, 9 J. R., 337; *Jennings v. Carter*, 2 Wend., 446; *Murray v. Burtis*, 15 id., 212; *Randall v. Cook*, 17 id., 53; *Bump on Fraud. Con.*, 135.) The sheriff, representing the owners of the property in this case, is entitled to all the presumptions raised by rules of law and of evidence in favor of creditors, including that in relation to the change of possession of property claimed. (*Stout v. Rappelhagen*, 51 How., 75; *Randall v. Parker*, 3 Sandf., 69; *Adams v. Davidson*, 10 N. Y., 312; *Griswold v. Sheldon*, 4 id., 592; *Boyd v. Dunlap*, 1 J. Ch., 478–484; *Jones v. O'Brien*, 36 Supr. Ct., 58.) The burden of proof rested on the plaintiffs, to show the transfer was made in good faith and for a valuable consideration. (*Tift v. Barton*, 4 Denio, 171; *Curd v. Lewis*, 7 Gratt., 185.) The return of the sheriff to the claim and delivery proceedings in the original action of Herter Bros., was one he was by law required to make. (Code of Procedure, § 217.) As such it is conclusive on all the parties to this action, as to the possession of the property, and cannot be assailed by the plaintiffs. Their remedy would be by an action for a false return. (*Putnam v. Man*, 3 Wend., 202; *Allen v. Martin*, 10 id., 300.) In order to prove the *mala fides* of a transfer of property, facts and circumstances may be given in evidence which together tend

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to show this, though separately stated they would be immaterial. (*Chapman v. O'Brien*, 34 Supr. Ct., 524.) Parol evidence may be given to show insufficient or want of consideration in a written instrument. (*Clinton v. Estes*, 20 Ark., 216; *Wheeler v. Billings*, 38 N. Y., 263; *Rosboro v. Peck*, 48 Barb., 92.)

ANDREWS, J. Herter Bros., by reason of the fraud of E. A. Stevens, could reclaim the furniture and retake it from his possession, or from the possession of any one except a transferee in good faith and for a valuable consideration. A transfer of goods by a fraudulent purchaser as security for or in payment of a precedent debt does not make the transferee a *bona fide* purchaser within the rule so as to enable him to hold the goods against the original vendor. There must be a fresh consideration at the time of the transfer to confer a good title as against the true owner. (*Root v. French*, 13 Wend., 570; *Weaver v. Barden*, 49 N. Y., 286.) And in a suit by the true owner to recover the goods against a person who claims title under the fraudulent vendee, the burden is upon the party claiming such title of proving that he is a purchaser in good faith and for value.

The defendant's intestate took the goods in question upon the requisition of Herter Bros. made in the replevin proceedings against E. A. Stevens the fraudulent purchaser, from the house which he occupied, but from which he was temporarily absent at the time the sheriff took the property. The defendant's intestate was not a trespasser in entering the house to execute the writ. He was admitted by some person therein and he had, by virtue of the direction of Herter Bros. indorsed on the affidavit in the action, the same right as they would have had to take the furniture in question. Upon the trial the plaintiff produced as the source of his title to the property, a bill of sale, executed by E. A. Stevens and his wife, which recited a consideration, but gave no proof of consideration independent of the recital in the instrument. The defendant on his part established by the admission of the

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plaintiff on the trial and by other evidence, the fraud of E. A. Stevens in obtaining the goods, and it was shown by the testimony of the wife of E. A. Stevens that no consideration was paid by the plaintiff at the time the bill of sale was executed, and the only inference, if any, which can be drawn from the evidence in favor of the existence of a consideration is that the bill of sale was taken in payment for, or as security for a debt owing by E. A. Stevens to the plaintiff. The defendant's counsel at the conclusion of the evidence moved to dismiss the complaint, whereupon the plaintiff's counsel asked to go to the jury on the question of plaintiff's possession of the property when it was taken by the defendant's intestate. The court refused to submit that question to the jury and dismissed the complaint.

There was no error in this disposition of the case. The question in whose possession the goods were at the time they were taken by the sheriff, was, as the case stood, unimportant. If they were in the possession of the plaintiff, Herter Bros., or the sheriff acting for them, had a right to take them unless the former was a *bona fide* purchaser for value. And if the recital of a consideration in the bill of sale was any evidence thereof as between the plaintiff and the sheriff or Herter Bros., the evidence of Mrs. Stevens, which was not denied or contradicted, destroyed any presumption arising from the recital, and a verdict of the jury finding that there was any new contemporaneous consideration, would not have been justified. As the case stood, therefore, when the motion to dismiss was granted, it appeared that Herter Bros. had a good title to the furniture with the right of possession, and the taking by the sheriff, by their direction, was justified.

The plaintiffs' counsel, on the trial, interposed a general objection to a question put to Mrs. Stevens whether any money was paid by the plaintiffs when the bill of sale was given. The objection was overruled and exception taken. No ground of objection was specified, and it is now claimed that she was incompetent to testify on the point to which the question related under section 399 of the Code. The

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general objection could only be considered as applying to the competency or materiality of the evidence and not to the competency of the witness to testify upon the subject. *Non constat* if the objection had been put on that ground, the fact would have been proved by other witnesses.

The judgment should be affirmed.

All concur.

Judgment affirmed.

| 79 260
| 126 340|

MARY E. SACIA, Respondent, v. NEAL W. O'CONNOR,
Appellant.

An application for a new trial, under the statute, in an action of ejectment, was made on behalf of defendant and one L., who claimed to have derived his interest from B. who, it was alleged, was the landlord under whom defendant was in possession. The right of L. was expressly controverted by the opposing affidavits, and it was also shown that, when the action was ready for trial, defendant withdrew his answer, and judgment was entered by his consent in open court. The application was made by an attorney who was not the attorney of record of defendant, and who had not been substituted in place of the original attorney. The application was denied with leave to renew. *Held*, that as it was at least very uncertain what were the facts, and whether a case was made out within the statute (2 R. S., 309, §§ 36, 37, as amended by chap. 485, Laws of 1862), and as the moving parties had not availed themselves of the permission given to supply the defects, the order should be affirmed.

(Argued December 9, 1879; decided December 16, 1879.)

APPEAL from an order of the General Term of the Superior Court of the city of New York, affirming an order of Special Term, denying a motion for a new trial under the statute (2 R. S., 309) in an action of ejectment.

The facts appear sufficiently in the opinion.

N. C. Moak, for appellant. It was not necessary that the application for a new trial should be made by defendant's

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attorney of record. (*Eagan v. Rooney*, 38 How., 121; *Weeks' Law of Attorney*, 427, 436; *Thorp v. Fowler*, 5 Cow., 446; *Trust v. Repoor*, 15 How. Pr., 570; *Cook v. Brewster*, 1 Duer, 679.) The judgment record, which shows there was a verdict, is better evidence of what took place on the trial than plaintiff's affidavit. And parol evidence was not admissible to contradict it. (2 Whart. Ev., § 980; 2 Whart. [Pa.] Rep., 470; 7 Wend., 103; 7 Maryland, 194; 82 Penn. St., 71; 73 Ill., 477, 482; 36 Mich., 239, 242.) Under the provisions of law, upon which the motion was made, it was sufficient that the judgment was upon the verdict of a jury. (2 R. S., 309, § 36, as amended by chap. 485, Laws of 1862, p. 977; 2 R. S., 309, § 37, as amended by chap. 292, Laws of 1878, p. 384.) Where the prescribed facts are shown to exist, these provisions of law leave no discretion in the court to deny the motion, or impose terms other than those prescribed by the statute. (*Rogers v. Wing*, 5 How. Pr., 50; 54 id., 113; *Shaw v. McMarin*, 2 Hill, 417.)

Ira D. Warren, for respondent. The motion should have been made by the attorney of record, or by some one substituted in his place. (2 R. S., 309, § 36, as amended by chap. 485, Laws of 1862, p. 977; 2 R. S., 309, § 37, as amended by chap. 292, Laws of 1878, p. 384.) A judgment rendered by consent of the party in open court does not come within the statute entitling a party absolutely to a new trial. (*Chautauqua Co. Bk. v. White*, 23 N. Y., 348; *Large v. Rophe*, 1 Duer, 701.) The most that could be said on the part of defendant is, that a verdict or judgment taken by consent was a default. (*Bennet v. Couchman*, 48 Barb., 74.) Leave to renew this motion being given it is not appealable. (*Robins v. Ferris*, 5 Hun, 286; *King v. Platt*, 2 Abb. Ct. App. Cas., 527.)

Per Curiam. We think that the papers upon which the application for a new trial in this action is founded do not establish facts which authorize the granting of the motion.

Opinion *per Curiam*.

The application is made on the behalf of the defendant and of one Josiah Lockwood. The interest of Lockwood is stated to have been derived from one Byrnes, who, it is alleged, was the landlord of the premises under whom the defendant was in possession. The right of Lockwood is expressly controverted by the opposing affidavit, and it is alleged that Lockwood has no lawful title or claim, and that he is neither heir or assignee of the defendant nor of Byrnes.

It is also shown by the affidavit that when the action was ready for trial the defendant withdrew his answer, and judgment was entered by his consent in open court. It is true the judgment record shows that by the direction of the court a verdict was found for the plaintiff. But without contradicting the record, it may be assumed from the affidavit, which is not controverted, that this was done by consent.

It also appears that the application is not made by the attorney of record, but by an attorney who has never been substituted in the place of the original attorney. The motion, then, is on behalf of a party whose interest in the premises is at least doubtful, in a case where consent has been given to the judgment, and by an attorney who is not shown to have had any authority. To say the least, it is very uncertain upon the papers what are the actual facts, and whether a case is made out for a new trial, within the statute: (2 R. S., 309, as amended by chap. 485 of the Laws of 1862.)

The defendant, or the party actually interested, had an opportunity to supply these defects by a renewal of the motion, as was authorized by the Special Term. This he has failed to do, and we think the order should be affirmed, with costs.

All concur.

Order affirmed.

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HENRY V. SCATTERGOOD, Appellant, v. SAMUEL WOOD et al., Respondents.

79	263
118	438
79	263
128	283
79	263
130	383

Plaintiff, who had invented an improved cotton gin, and had applied for letters patent therefor, contracted to sell the same to defendants, and to assign the letters patent when obtained, for a sum specified; the contract contained a warranty that said cotton gin would "be equal in all respects to the best saw gin then in use." In an action upon the contract, wherein defendant set up a breach of the warranty as a defense, *held*, that the testimony of men, competent from education and experience to express an opinion as to whether plaintiff's invention was in fact equal to the best saw gins, was competent; that the inquiry related to a matter which was not the subject of general knowledge but which depended on facts, from their nature difficult if not impossible to be testified to, and it could only be answered by one having peculiar knowledge and skill in the use of this and other machines.

Plaintiff having given evidence as to the comparative merits of this and other machines, *held*, that he could not object to the giving of similar evidence on behalf of defendant.

(Argued December 4, 1879; decided December 19, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of defendants, entered upon the report of a referee.

This action was brought to recover the purchase-price agreed to be paid in and by a contract between the parties. The contract recited that plaintiff was the inventor of an improved cotton gin and condenser attached thereto, and had applied for letters patent therefor; this he contracted to sell to defendants, and to assign the letters patent when issued, for a sum specified. The contract contained this clause: "Said party of the first part (plaintiff) warrants said cotton gin to be equal in all respects to the best saw gin now in use." Defendants set up as a defense, among other things, a breach of this warranty. After the receipt of the evidence on the part of plaintiff, which is set forth in the opinion, defendants called various witnesses who, after giving testimony showing that they were familiar with

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the working of cotton gins and had seen plaintiff's gin work, were asked whether, in their opinion, plaintiff's gin was equal in all respects to the best saw gin then in use, of which they had knowledge. This was objected to on the ground, among others, that it called upon the witness to decide the question submitted to the referee for his decision; the objections were overruled, and plaintiff's counsel duly excepted. The witnesses answered, substantially, that plaintiff's invention was not equal to saw gins then in use.

Further facts appear in the opinion.

J. E. Dewey, for appellant. It was error to receive in evidence the opinions and conclusions of defendants, and the expert witnesses called by them as to whether plaintiff's gin was equal to the best saw gin then in use. (*Steinbach v. La Fayette Ins. Co.*, 54 N. Y., 90, 96; 1 Phillips' Ev., 558, 560, 660; 1 Gr. Ev. [11th ed.], 605, § 44C; 2 Ph. on Ins., § 2112; *Jameson v. Drinkald*, 12 Moore, 148; *Sills v. Brown*, 9 Carr. & P., 601; *Heroy v. Van Pelt*, 4 Bosw., 60, 62; *Norman v. Wells*, 17 Wend., 137, 161-164; *Lincoln v. Sar., etc. R. R. Co.*, 23 id., 425, 432-434; *Morehouse v. Mathews*, 2 Comst., 514; *Terpenning v. Com. Ex. Ins. Co.*, 43 N. Y., 279; *Simons v. Monier*, 29 Barb., 420, 425; *Hudson v. Caryl*, 2 T. & C., 245; *Reynolds v. Robinson*, 64 N. Y., 595-596; *Harger v. Edmonds*, 4 Barb., 256-258; *Giles v. O'Toole*, id., 261-264; *Robinson v. Kinne*, 1 T. & C., 60, 62.)

Samuel Wood, for respondents.

DANFORTH, J. The complaint alleges that by the contract the plaintiff "did warrant said cotton gin to be equal in all respects to the best saw gin then in use." The defendants reiterate this averment, and the contract set out in the answer, and accepted by the plaintiff as correct, justifies the statement. The defendants set up a breach of this warranty as a defense to the plaintiff's action, and the referee has found in

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favor of the defendants upon that issue. This finding is sustained by the General Term, and is obviously supported by evidence. It cannot therefore be reviewed in this court.

The learned counsel for the appellant however insists that the referee erred in receiving the opinions of witnesses upon the point referred to, but we think the evidence was properly admitted, and that the exception thereto must fail. In the first place testimony of the same character had already been given by the plaintiff, and in the next place the fact in issue could only be determined by a comparison of the merits of various machines, with those of one constructed under the plaintiff's invention. There was an inquiry of the plaintiff's principal witness, concerning the "condition of the cotton as to cleanliness as it came from different machines," and he says "from the plaintiff's gin it was cleaner and whiter," and from comparison he speaks of the greater production of one machine over the other, the quality of its work, economy of operation, and facility of repair, in each instance giving an opinion. The plaintiff speaking as a witness, and testifying in his own behalf, goes a little farther. Referring to the contract he says, at the time of making it, "I was acquainted with the various saw gins then in use" * * * and being asked by his counsel, "How did the saw gins compare with the American Needle Cotton Gin and Condenser" (the one in question) "at the time of the execution of the contract * * * in their operation and working," answered, "They were very inferior to the American Needle Cotton Gin and Condenser at the time of the execution of the contract." Similar testimony was given by Viall and True, both witnesses for the plaintiff. The example thus set was followed by the other side, and the plaintiff's objection is therefore unavailing. But we think the evidence was competent. The defendants' witnesses called to express an opinion were not merely experts, nor were they called upon to give an opinion upon a theoretical state of facts, but were asked for their judgment upon matters within their personal knowledge, happening under their own observation, and concerning which they

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were competent from education and experience to form and declare an opinion.

The general rule requires a witness to testify to facts, and not conclusions. Yet to this rule there are exceptions, and one is here presented. The parties by their contract required that the cotton gin covered by the patent "should be equal in all respects to the best saw gin then in use." To determine this question, special knowledge was necessary, and this could be best acquired by experience in the use of that and other machines made for a like purpose. Indeed it is doubtful whether any other person could answer it. The invention or a machine made under it could be described, and its operation, as it affected the quantity and quality of the substance with which it was fed, stated to the referee; and all this was done, but it was also proper to take the opinion of competent persons, as to its practical working, and its comparative value.

The inquiry related to a matter which was not the subject of general knowledge, but depended on facts which from their nature it would be difficult if not impossible to place before the referee, and the statement embodied in the opinion given in evidence, was itself a fact derived from peculiar knowledge and skill in the use of the various machines referred to. It was the result of professional knowledge, and practical experience (*Emerson v. Lowell Gas Light Co.*, 6 Allen, 146), and the question raised by the warranty could hardly be answered except by the direct opinion of those, who possessing this superior knowledge and experience had seen the machines in operation, or knew the merits of machines constructed under the plaintiff's patent, and others then in use. Upon this ground therefore, as well as the one first stated, I think the evidence objected to was properly received. Nor do I discover that the referee erred in any other ruling.

The judgment should therefore be affirmed.

All concur.

Judgment affirmed.

Statement of case.

**IN THE MATTER OF THE PEOPLE ex rel., THE ATTORNEY
GENERAL v. THE SECURITY LIFE INSURANCE AND
ANNUITY COMPANY.**

A receiver of an insolvent life insurance company may, at any time, apply to the court for instructions in regard to any matter touching the fund placed in his custody. Especially is this so where the fund, through his error, is in danger of being unfairly distributed.

The receiver owes a like duty to all claimants upon the fund; and it is his duty, as far as possible, to see that each has an equal opportunity to enforce his claim.

A receiver of such a company obtained an order as prescribed by statute (2 R. S., 467, § 56), for publication of notice to creditors, requiring them to exhibit their claims within a time specified. Before the expiration of the time the receiver addressed a circular to policy-holders, to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further proof; misled by such circular the holders of such policies did not make proof of their claims. These were objected to by other creditors, and were rejected by the referee to whom it was referred to take proof as to distribution of the assets. Whereupon, and before any dividend had been made, the receiver applied for and obtained an order giving two months further time within which such claims could be presented and established before the referee. *Held*, that the receiver was authorized in making the application; that the court had power, in its discretion, to grant it; and that the exercise of this discretion was not reviewable here.

***In re H. F. and M. Ins. Co.* (45 N. Y., 310), limited and distinguished.**

The power and discretion of the court in reference to publication of notice in such case, may be exercised to the same extent as in other proceedings or actions, save that the notice must be for "not less than six months" (§ 56); and the power of the court is not exhausted by making an order.

(Argued December 9, 1879; decided December 19, 1879.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming an order of Special Term, granted on the application of Wm. H. Wickham, receiver of said The Security Life Insurance and Annuity Company, as follows:

"Ordered, that said receiver be and he hereby is authorized to notify all persons, who by the books of said company in his possession appear to have claims, not yet pre-

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sented against said company, to present their claims to said receiver within two months from the date of this order; and said receiver is hereby authorized and directed to admit as against the funds in his hands as receiver, all claims which shall be satisfactorily established before him by the time specified; that all such claims be estimated and valued upon the principles laid down in the referee's report mentioned in said petition, and be placed upon the dividend list of said receiver, subject to all changes and modifications which may hereafter be made in said referee's report."

Said order was granted upon the petition of the receiver, which stated, in substance, that under an order of the court, duly granted February 26, 1877, he published a notice pursuant to the statute requiring all creditors of said company and all persons having claims of any kind against it to exhibit them to him, and to become parties to the proceeding on or before September 3, 1877, and that on failure so to do they would be precluded from all benefit of the order or decree which might be made in the proceeding, and from any distributive share of the assets under such order or decree. That said petitioner, under advice of his counsel, issued a circular to holders of policies in force at the time of his appointment, of which there were a large number, all the facts in relation to which appeared upon the books of the company, to the effect that he would assume all policies in force on the books of the company at the date of its failure were claims against the company for their reserve value, without subjecting creditors to further proof. That on December 31, 1877, upon the petitioner's application, a referee was appointed by order of the court to take proof and report, among other things, as to those entitled to participate in the fund in the hands of the receiver, and their respective shares; that upon the hearing before said referee certain creditors objected to the allowance of any claims, except on the part of those who had made formal proof of their claims; that the referee made and filed his report September 20, 1878, in which he finds that only those creditors

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who had formerly made claims were entitled to share in the distribution; that said report was confirmed by order of the court February 19, 1879; and that it would be inequitable to debar from a participation those who, in reliance upon the circular, had failed to formally present their claims.

William Barnes, for appellants. The receiver had no right to apply to the court for an order, giving further time, for creditors to present claims. (*In re Colvin*, 3 J. Chy., 280, 303; *Comyn v. Smith*, 1 Hogan, 82; Kerr on Recrs. [Bispham 2 ed.], 221, 222; Edwards on Recrs., 3, 12, 22; *Tracy v. First Nat. Bk. of Selma*, 37 N. Y., 523; 2 Waits' Pr., 245; *Miller v. Elkins*, 3 L. J. [First Series], 128, 129; *Ireland v. Eade*, 7 Beav., 55, 56; *Parker v. Dunn*, 8 id., 497; *Clarke v. Fisher*, Sau. & Scul., 684; *Duke of Dorset v. Crosbie*, id., 683; *Evans v. Taylor*, id., 681; *Earl of Kilkenny*, 7 Irish Eq., 591; *In re Harmony F. and M. Ins. Co.*, 45 N. Y., 310, 315, 316, 317; 9 Abb. Pr. [N. S.] 349, 358.) When the time to appeal is fixed by statute the court cannot lawfully extend the statute time. (*Salles v. Bartler*, 27 N. Y., 638; Wait's Old Code, 648, 652, notes, [c.]; *Wait v. Van Allen*, 22 N. Y., 321; *Jackson v. Wiseburn*, 5 Wend., 136.)

Hamilton Cole, for respondents. The court had power to grant the receiver's application. (*N. Y. Ice Co. v. N. W. Ins. Co.*, 23 N. Y., 361; *Buckingham v. Dickinson*, 54 id., 682.) General receivers have a standing in court to protect the rights of those whom they represent, and they may defend one class of claimants against another. (71 N. Y., 222.)

DANFORTH, J. This case has lately been before us, but on this appeal presents a new question. It was then decided that the referee did not err in rejecting certain claims upon the ground that they had not been presented within the time limited by an order made by the Supreme Court on the 26th day of February, 1877, to the effect that notice should be

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published requiring all persons having claims of any kind against the above named company to exhibit them to the receiver and become parties to the proceeding within six months from the time of the first publication of the order. (78 N. Y., 116.) But upon this point nothing more was decided. The order gave the referee jurisdiction, and by its terms, claims not presented within the time specified were precluded from any benefit under those proceedings. The order was a guide to the referee and he was bound by it. But a very different question is now before us. It appears that after obtaining the order referred to and before the expiration of the time thereby limited, the receiver addressed a circular to a large number of policy-holders, saying in substance that policies in force on the books of the company were claims against it for their reserve value and would be allowed without subjecting their holders to the expense of further proof. Misled by this notice the creditors did not make formal proof of claims answering the above description,—and when brought forward they were objected to by certain creditors and are the ones rejected by the referee. The receiver thereafter applied by petition to the Supreme Court, stating these facts, and on the 2d day of May, 1879, obtained an order giving two months further time within which such claims could be presented and established before the referee. This order has been affirmed by the General Term. The appellants in this court are policy-holders whose claims were presented to the referee and allowed under the order of February above referred to. The learned counsel for the appellants contends that the receiver has no standing in court, that he can be heard only as to “his fees and compensation” and had no right to be heard upon the motion which resulted in the order appealed from; and, *second*, that the court itself had no power to grant the order. Upon both questions we think he is in error. Since the receiver is an officer, or, as he is sometimes called, “the hand”—of the court, it would be singular if he could not at any time go to it with his complaint or for instructions in regard to any mat-

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ter touching the fund placed in his custody, and more especially when, as in the case before us, it is in danger, through his own error, of being unfairly distributed. He is not to advocate the cause of one claimant as against another, — between them he is indifferent, owing a like duty to all, — and for that very reason should as far as possible, see to it that each has an equal opportunity to enforce his claim. He stands as their representative and is bound to give them reasonable aid. (*Gillett v. Moody*, 3 Com., 488; *People ex. rel. v. Security Life Ins. Co.*, 71 N. Y., 222.) Next, as to the power of the Supreme Court over the proceeding in question. The proceeding is in equity under the provisions of the statute (2 R. S., p. 462, tit. 4, art. 2, part III, chap. VIII), and, so far as the point before us is concerned, under section 56, page 466. This section obviates the necessity of separate suits and prescribes a short method of obtaining the benefit of a decree for all the creditors, so far as it relates to the corporate property and effects (*Judson v. The Rossie Galena Company and others*, 9 Paige, 598), and the power of the court over the proceeding is the same as it would be over a final decree obtained in a creditor's suit commenced for the benefit of all parties. In such a case it is well settled that a creditor, upon a proper case made by petition, may be permitted to come in and prove his debt at any time while the fund or any part thereof is under the control of the court, notwithstanding the time limited by the master for the creditors to come in and prove their debts had expired (*Brooks v. Gibbons*, 4 Paige, 374), or, as is elsewhere said, "the neglect or omission of one will not preclude his right to be afterwards let in, provided the other creditors are placed in no worse condition than if all had come in at the same time" (*Pratt v. Rathbone*, 7 Paige, 269; *Warner v. Hoffman*, 4 Edwards' Ch'y R., 393), and the same rule has been applied in proceedings against corporations. (*Judson v. The Rossie Galena Co.*, 9 Paige, 598; *Matter of the City Bank of Buffalo*, 10 id., 378.) The case before us is within both conditions. No dividend has been made.

Nor is the power of the court limited by statute except in one particular. The propriety or necessity of the order is to be determined by the court; it may direct the manner of its publication,—the time within which the creditors may come in may be prescribed by the court. It must be a reasonable time; but, — and this is the only statutory command, — it must be “not less than six months.” It may be more. (§ 56, *ante*.) In all else the judgment and discretion of the court may be exercised, to the same extent as in other proceedings or actions. Subject therefore to this limitation, the time within which demands shall be presented is prescribed by the court, and the case is unlike that of an appeal, to which the learned counsel for the appellant refers, where the time within which it must be taken is fixed by statute, and that the court cannot extend it, is well settled. (*Salles v. Butler*, 27 N. Y., 638; *Wait v. Van Allen*, 22 id., 321.) But in the case before us the power is given to the court, and it was not exhausted by the making of the first order. A longer time might have been given by that order, or upon cause shown the time therein specified could have been extended, or it having expired, it would have been a matter of course to relieve a creditor from default upon sufficient cause shown. This would follow from the control which the court has over its own orders and judgments. The case of the *Harmony F. and M. Ins. Co.* (45 N. Y., 310), is not to the contrary. There the Supreme Court had denied an application similar to the one now under review and arising in like proceedings, under the same statute. Upon appeal to this court, GROVER, J., was of the opinion that the court below had no power to grant the relief sought for, or extend the time specified in the order; but also, if it had, that it was a power to be exercised at its discretion. Judge ALLEN was of the opinion that the Supreme Court had the power but that its exercise was discretionary and not subject to review in this court. FOLGER, J., concurred in Judge ALLEN’s opinion, and the other judges expressed no opinion upon the question of the power of the Supreme

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Court to grant the relief sought. That decision therefore may well stand upon the reasons assigned in the opinion of Judge ALLEN, and the second ground stated by Judge GROVER, in which all the members of the court seem to have concurred. We are of the opinion that the matter rested in the discretion of the Supreme Court, that this appeal is not well taken and should be dismissed, with costs.

All concur.

Appeal dismissed.

JAMES BURKITT, Respondent, v. WILLIAM HARPER et al.,
Appellants.

By a lease from the owners of certain premises in the county of Queens it was agreed in substance that, "as part of the consideration of the letting," the improvements built or to be built upon the premises by the lessee should revert to the lessors at the expiration of the term, and that the lessee would leave them upon the premises; also, that the lessee would insure for half the cost of the buildings built or to be built upon the premises, and in case of fire would devote the proceeds to the re-erection or restoration of the improvements destroyed; in case of default in any of the covenants, on the part of the lessee, the lessor had the right to re-enter. Plaintiff, under a contract with the lessee, erected a building upon the premises. The lessors lived near the premises, saw the building from time to time while plaintiff was engaged in its erection, and made no objection. In an action to foreclose a mechanic's lien, *held*, that the lessee was permitted by the owners to erect the building within the meaning of the mechanic's lien law for said county (§ 1, chap 478, Laws of 1862); and that the said lien was valid and enforceable against the land.

Conklin v. Bauer (62 N. Y., 620); *Knapp v. Brown* (45 id., 207); *Muldoon v. Pitt* (54 id., 269), distinguished.

The notice of lien filed did not allege that the owners permitted the lessee to build, but that they permitted the plaintiff to furnish the work and material; it specified the amount of the claim, the person against whom it was made, and the name of the owner and the situation of the building, particularly describing the land; it also stated that the work and material were furnished pursuant to a contract with the lessee.

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Held, that the notice was sufficient; that it was not necessary to state therein the permission of the owner, this was simply a fact to be alleged in the complaint.

(Argued December 12, 1879; decided December 19, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 14 Hun, 581.)

This action was brought to foreclose a mechanic's lien upon certain premises in the county of Queens.

The facts appear sufficiently in the opinion.

Philip S. Crooke, for appellants. The lessee could not incumber the land with the price of materials and labor put upon it without the express permission or direction of his landlord. The permission contemplated by the statute must be actual. (*Conklin v. Bauer*, 62 N. Y., 620; Bouv. L. Dict. "Permission;" *Rollins v. Cross*, 45 N. Y., 766; Laws 1862, chap. 478; *Knapp v. Jackson*, 45 N. Y., 207, 211; *Muldoon v. Pitt*, 54 id., 260.)

Julien T. Davies, for respondent. The lessee was the owner of the land within chapter 478 of Laws of 1862, and his interest was subject to a lien under it. (*Knapp v. Brown*, 45 N. Y., 212; *Loonie v. Hogan*, 5 Seld., 435; *Ombony v. Jones*, 19 N. Y., 234; *Rollins v. Cross*, 45 id., 766; *Hackett v. Badeau*, 63 id., 476; *Otis v. Cusack*, 43 Barb., 546.) Under a contract for the sale of real estate where the vendor agrees to loan the vendee money to erect buildings thereon, and to give him a deed when they are completed, at the same time taking back a mortgage for part of the purchase money, permission will be drawn from the terms of the contract which will support a mechanic's lien filed against the land itself and the vendor's interest. (*Gates v. Whitcomb*, 4 Hun, 137; *Riley v. Watson*, 3 id., 568; *Hart v. Wheeler*, 1 T. & C., 403; *Hackett v. Badeau*, 63 N. Y., 476; *Wheeler v. Scofield*,

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67 id., 314; 6 Hun, 655.) The notices of lien filed by plaintiff were not defective. (Laws 1862, chap. 478, § 3, p. 947.) The objection to the form of the notices is made too late. (*Hubbell v. Schreyer*, 15 Abb. Pr. [N. S.], 300; *Moran v. Chase*, 52 N. Y., 346; *Darrow v. Morgan*, 65 id., 333.)

EARL, J. This is an action to foreclose a mechanic's lien under chapter 478 of the Laws of 1862. Section one of that act provides, that "any person who shall hereafter perform any labor or furnish any materials in building, altering or repairing any house, building, etc. by virtue of any contract with the owner thereof or his agent, or with any contractor or sub-contractor, or any person permitted by the owner of such lands to build, repair, alter or improve, as aforesaid, within the county of Kings or Queens, shall, upon filing the notice prescribed in the third section of this act, have a lien for the value of such labor and materials upon such house, building and appurtenances, and upon the lot of land upon which the same stand, to the extent of the right, title and interest, at that time existing, of such owner, in the manner and to the extent hereinafter provided," etc. In this case, defendants Harper and Eldert owned some land in Queens county and leased the same to Davis. Under a contract with Davis, plaintiff erected thereon a certain building; and the main question to be determined is whether such building was erected by the permission of the owners Harper and Eldert, within the meaning of the act. We think it was so erected.

It is clear that the erection of the building was within the contemplation of the parties to the lease at the time of its execution. The term was eight years, at an annual rent. It is expressly agreed in the lease, "as part of the consideration of the said letting, that the improvements built or to be built upon the premises are to revert to the parties of the first part at the expiration of this lease, to belong to them without further consideration therefor," and that the lessee

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will leave such improvements upon the premises for the benefit of the lessors ; and it is further agreed that the lessee " will insure against fire in some company, to be approved of by the parties of the first part, for at least one-half the amount or cost of the buildings erected and to be erected on the premises, and to maintain the same during said term, and in case of fire to devote the proceeds of such insurance to the re-erection or restoration of such improvements so burnt or destroyed." It is also provided in the lease that, in case of default in the payment of the rent, or in any of the covenants contained in the lease, the lessors are to have the right of re-entry. It is thus clear that the lessors had an interest in the erection of the building—a greater interest even than the lessee. During the term of the lease the building is to them a security for the performance by the lessee of his covenants, as it is to come to them at once in case of his default. It is to belong to them at the expiration of the lease, and during the term the lessee is to keep it insured for their benefit, and to restore it if destroyed by fire. In addition to this the lessors lived near the premises and saw the building from time to time while plaintiff was engaged in its erection, and made no objection to the erection of the same. Under such circumstances, we think the learned judge at Special Term was fully warranted in finding that Davis was permitted by the owners to erect the building.

In *Conklin v. Bauer* (62 N. Y., 620), the building was erected for a person to whom the owners had agreed by parol to sell the land ; and the jury found, upon conflicting evidence, that there was no permission by the owners. That case is unlike this and is no authority to uphold the contention of these defendants. In *Rollin v. Cross* (45 N. Y., 766), the defendant, Mrs. Cross, entered into a contract for the purchase of land from Betts. She had an understanding with Goodwin that a house was to be built upon it for him and his family, and that she was to advance money to assist him in building it. Goodwin, in November, 1867, made a contract with Pick to build for him a house upon

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the land, and under such contract Pick and his assignee Rolin did work and furnished material in the erection of the house. In January, 1868, Betts conveyed the land to Mrs. Cross, in pursuance of his contract with her, and in April thereafter she conveyed the property to Rushmore. It was held that under the language of the act of 1862, Mrs. Cross, while she was merely an equitable owner, having the contract of purchase, but no deed, was not an owner, within the meaning of the statute; but that if any equitable owner, in such a case, permits a building to be erected, and, before lien filed, by the performance of a contract of purchase becomes the legal owner, the conveyance will be held to relate to the time when the contract of purchase was made, and such owner to be within the statute; and the lien filed against her as owner, before her conveyance to Rushmore, was enforced, because she permitted Goodwin to build upon the land.

The case of *Knapp v. Brown* (45 N. Y., 207), arose under the act chapter 500 of the Laws of 1863, the mechanic's lien law, relating to the city of New York. That law is unlike the one governing this case in some important features. In that case there was a lease very much like the one in this case, and the lessor was to have, at the expiration of the term, certain improvements to be made by the lessee. The plaintiff furnished work and material, under a contract with the lessee, and attempted to enforce a lien for them against the lessor as owner; and the court held, construing the language of that statute, that no lien could be created upon the interest of any person as owner of the land, except such person had either himself or by his agent entered into a contract for doing the work, either express or implied; and that the lien was only authorized as against owners so contracting for or employing persons to do the work. A similar decision, under the same statute, was made in *Muldoon v. Pitt* (54 N. Y., 269). Without further commenting upon cases, it is sufficient to say that there is no authority upholding the contention of these defendants.

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The learned counsel for the defendants also claims that there was such a defect in the notice of lien filed that the plaintiff acquired no lien, and hence that his judgment should be reversed. This claim is not well founded. The statute authorizes the lien because the plaintiff furnished work and material to Davis, who was permitted by the owners to build. There is no allegation in the notice of lien that the owners permitted Davis to build, but the allegation is that the owners permitted the plaintiff to furnish the work and material. Section three of the act specifies what the notice must contain. It must specify the amount of the claim, the person against whom the claim is made, the name of the owner, and the situation of the building. All this is specified in this notice. It specifies the amount of the claim and what it is for, that the work and material were furnished in pursuance of a contract with Davis; that these defendants and Davis were the owners of the land, and the land is particularly described. The statement as to the permission of the owners was wholly unnecessary and cannot vitiate a notice otherwise sufficient. It was necessary that the complaint should contain a proper allegation as to the permission; and, as amended, it does contain it.

Therefore, finding no error, the judgment should be affirmed, with costs.

All concur, except MILLER, J., dissenting.

Judgment affirmed.

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THE PEOPLE ex rel., ABRAM H. DAILEY et al., Respondents,
v. WALTER L. LIVINGSTON, Appellant.

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The provisions of the act of 1872, "to regulate elections in the city of Brooklyn" (§§ 12, 13, chap. 575, Laws of 1872), providing for preserving the ballots, are germane to the subject expressed in the title; their incorporation in the act, therefore, does not render it violative of the provision of the State constitution, declaring that no private or local bill shall embrace more than one subject; and that shall be expressed in the title. (Art. 3, § 16.)

The provision of said act (§ 13), requiring the board of canvassers to deposit the ballot-boxes in the department of police, does not require the canvassers personally to carry the boxes to the police department, nor does it require the boxes to be deposited at police headquarters; a delivery of the boxes by the canvassers to police officers assigned for that purpose, and a deposit of said boxes by such officers in the precinct station-houses, is a substantial compliance with the provision.

The provision requiring, that after the canvass is completed and the ballots returned to the boxes, said boxes shall be "securely sealed up by the canvassers," contemplates that the boxes shall be so sealed that they cannot be opened without breaking the sealing.

Where the inspectors sealed the apertures to the boxes, through which the ballots were inserted, and the canvassers did not remove these seals, but delivered the boxes to the police department without further sealing, *held*, that this was not a compliance with the act.

But, *held*, that this provision was directory only, and where it is proved satisfactorily that the boxes had been kept "undisturbed and inviolate," the omission of the canvassers to seal up the boxes, as contemplated, does not render the ballots inadmissible as evidence.

The burden of proof, however, is upon a party producing the ballot-boxes to show to the satisfaction of a jury that they have been kept undisturbed and inviolate; it is not sufficient that a mere probability of security is proved, the fact must be shown with a reasonable degree of certainty.

The use of the ballots so preserved, as evidence, is not limited to cases of city officers merely, they are admissible as well in cases of other officers voted for in the city of Brooklyn.

In an action of *quo warranto* wherein the ballot-boxes were produced and the ballots received in evidence to impeach the accuracy of the returns of the inspectors of election, and wherein it appeared that the boxes had not been sealed up by the canvassers, and had been kept insecurely, so that the question whether the ballots were the identical ones voted was one of fact for the jury, the court instructed the jury, in substance, that to justify their rejection, it must appear affirmatively by direct evidence, or from circumstances, that the boxes had been tampered with, *held*, error; and that the error was fatal to the judgment.

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It is not essential, in an exception to a portion of a charge, to repeat the language excepted to, although this is strictly the more accurate practice; it is sufficient if the portion objected to is pointed out with such accuracy that there can be no misapprehension as to the application of the exception.

People ex rel. Dailey v. Livingston, (18 Hun, 59), reversed.

(Argued October 3, 1879; decided December 19, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of relator, entered upon a verdict. (Reported below, 18 Hun, 59.)

The nature of the action and the facts are set forth sufficiently in the opinion.

Walter L. Livingston, appellant in person. It was error to allow a recount of the ballot-boxes chapter 571 of Laws of 1872, respecting the sealing and custody of them not having been complied with. (*Worrall v. Parmelee*, 1 N. Y., 519; *Baird v. Gillett*, 47 id., 186; *Starbird v. Barrons*, 43 id., 200; *Williams v. Fitch*, 18 id., 546; 1 Kent's Com., 462; *Waller v. Harris*, 20 Wend., 561; *McCluskey v. Cromwell*, 1 Kern., 601; *Newell v. People*, 3 Seld., 97; *Dryfuss v. Budge*, 45 Miss., 247; *In re Em. Ind. Sv'gs Bk.*, 8 W. Dig., 208, 212; Sedgwick on Stat. and Const. Law, 368; *People v. Schermerhorn*, 19 Barb., 558; *Cook v. Kelly*, 12 Abb. Pr., 35, 36; affir'd 14 id., 466; *Dwarris on Stats.*, 641; *Hardmann v. Bowen*, 39 N. Y., 199; *Smith v. People*, 47 id., 339; 6 Abb. [N. S.], 276; 1 Greenl. Laws of N. Y., 316; Laws of 1799, chap. 51; *Jackson v. Hobby*, 20 J. R., 357, 361; *Richardson v. Gere*, 21 Wend., 156, 157; *People v. Hadden*, 3 Denio, 220; *Fleming v. Halenbeck*, 7 Barb., 271; *Smith v. Randall*, 3 Hill, 495; *People v. Sackett*, 14 Mich., 329; Am. Law of Elections, § 277; *Goodwin v. Wilson*, 42d Congress; *Butler v. Lehman*, 1 Bartlett, 354; *Kline v. Verree*, 1 id., 381.) A recount was error, because the evidence showed affirmatively that the ballots had been unsafely kept, and in such a way as to make tampering with

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them easy. (McCreary's Am. Law of Elections, 209, 210; *Butler v. Lehman*, 1 Bartlett, 354; *Kline v. Verree*, id., 38; 1 id., 176; *Archer v. Allen*, id., 169, 176; *People v. Sackett*, 14 Mich., 328.) The ballots should not have been admitted in evidence, because there was no proof that they were the same ones that had been voted at the election. (*State v. Donnerwirth*, 21 Ohio, 216.) The recount of the ballots should not have been allowed, because the provisions of the act of 1872, under which they were recounted, do not apply to the election of a county officer, which the surrogate is. (1 R. S. [6th ed.], § 57, p. 441; Sedgwick on Stat. Law, 209, 228 [note]; Dwarries on Stats., 699, 726; *Smith v. People*, 47 N. Y., 330-339; *Chase v. Lord*, 6 Abb. [N. S.], 276.) The recount of the ballots should not have been allowed, because the provisions of the act of 1872, under which it was allowed, are unconstitutional. (*People v. O'Brien*, 38 N. Y., 193, 195; *Gasken v. Meek*, 42 id., 186; *People v. Allen*, 42 id., 404-419, 420.) Before the jury could reject the ballot-boxes, they must have evidence of tampering with the boxes. (*People v. Cicott*, 16 Mich., 283; *State v. Donnerwirth*, 21 Ohio, 216; *Butler v. Lehman*, 1 Bartlett, 260; *Kline v. Verree*, id., 390; *Jutte v. Hughes*, 67 N. Y., 273; *Wehle v. Haviland*, 42 How. Pr., 399; *Benedict v. Johnston*, 2 Lans., 94-97; *Valleau v. Smith*, 8 W. Dig., 217.)

B. F. Tracy, for respondent. The provisions of the statute as to the duties of the inspectors are directory, and a failure to comply with all of them would not affect the certificate of election. (*People ex rel. v. Cook*, 8 N. Y., 67, 82, 87, 88, 89; *People ex rel. v. Higgins*, 3 Mich., 233; *People v. Van Cleve*, 1 id., 362; *People v. Cicott*, 16 id., 283; *People v. Sackett*, 14 id., 320; *People v. Cook*, 14 Barb., 290, 326-328; *Pradat v. Ramsay*, 47 Miss., 24; *Hudson v. Solomon*, 19 Kas., 177.) It was proper to show by the voters that the certificate was false. (*People v. Pease*, 27 N. Y., 45; *Hudson v. Solomon*, 19 Kansas, 177; *Dough-*

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erty v. Hope, 3 Denio, 251; *Elmendorf v. Mayor*, 25 Wend., 696; *Merchant v. Langworthy*, 6 Hill, 646; *Ex parte Heath*, 3 id., 43; *Cleveland v. Porter*, 74 Ill., 76; 61 Ind., 416.) The election law of 1872 was not unconstitutional. (*People ex rel. v. Laurence*, 26 Barb., 177; *Sharp v. Mayor*, 31 id., 572; 18 How. Pr., 572; *Vil. of Gloversville v. Howell*, 70 N. Y., 290.) To make an exception available the nature and ground of it must be specified to the court, or it will not be entertained. (*Walsh v. Wash. Ins. Co.*, 32 N. Y., 440.)

CHURCH, Ch. J. This is a *quo warranto* to try the title to the office of surrogate of Kings county. The relator and defendant were opposing candidates for that office at the general election held in 1876. The county canvassers declared that the defendant was elected by 288 majority and gave him the certificate of election. At the trial, after considerable proof had been given, it was admitted by the defendant that there was an error in the returns of one hundred in each of two districts and forty in another district in his favor by allowing which would reduce his majority to forty-eight. The relator claimed that the proof showed that other corrections should be made in the returns which would obliterate this majority and give him a majority, but as to these the evidence was not conclusive and the jury might have found in favor of the defendant, and the judge in his charge expressed the opinion that aside from the recount of the ballots the evidence showed that the defendant was elected by a small majority. The ballot-boxes were produced and the ballots recounted, and in four election districts there was a sufficient discrepancy found between the returns for those districts and the ballots, as appeared by the recount, to give the relator about 150 majority, and the jury found a verdict in his favor. The questions involved therefore relate to the admissibility of the ballot-boxes and the ballots therein found, and the rulings at the trial in respect to them. The authority for preserving the ballots is contained in an act of the Legislature passed in 1872 and amended in 1873 and

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1874, and is applicable only to the city of Brooklyn. This act is exceptional upon this point and is a departure from the long established policy of the State. Since 1787 under the various election laws which have been passed, the ballots are required to be destroyed immediately after the canvass is completed. (1 Greenleaf's Laws of N. Y., 316; chap. 51, Laws of 1799.) And such is the existing statute. (1 R. S. [6th ed.], 441.)

A point is made that the act is unconstitutional, upon the ground that the title does not fairly express the subject. The title is, "An act to regulate elections in the city of Brooklyn." This objection is not tenable. The provisions for preserving the ballots to be used as evidence are *germane* to the regulation of elections, and a means which the Legislature determined proper to verify the ballots received at the election. This statute is therefore binding and operative, and must be construed according to established rules, irrespective of our views of its wisdom or policy. It provides for a board of inspectors whose duty it is to receive the ballots and deposit them in the boxes and also for a board of canvassers whose duty it is to count the votes and make a return of the result. The twelfth section provides that immediately after closing the polls "the inspectors shall *securely seal* the several ballot-boxes and each of them, and deliver the same together with the poll-lists and registers of electors to the board of canvassers;" and the thirteenth section requires, after the canvass is completed, that the ballots shall be replaced in the boxes and each box shall be "*securely sealed up* by the canvassers, and they shall then be deposited by them in the department of police, and shall there be kept *undisturbed and inviolate*, until they are needed at the next election unless required as evidence in any court of record." Several objections were made to the introduction of the boxes and the recount of the ballots:

First—That the canvassers did not themselves deliver the boxes to the police department. The boxes were delivered to the inspectors by police officers assigned to that duty,

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who retained the keys until the boxes were delivered to the canvassers, and such officers received the boxes from the canvassers and deposited them in the precinct station-houses. This was a substantial compliance with the requirement.

Second — It was objected that the boxes should have been deposited at police headquarters. The department of police is under the supervision of three police commissioners, who designate police headquarters and precinct station-houses. They all belong to the department, and the deposit of these boxes in the respective precinct station-houses was by the direction or sanction of the commissioners, and was, we think, a compliance with the act.

Third — That the boxes were not properly sealed. This presents a more serious question. The statute requires the inspectors to securely seal the boxes, and that they shall be securely sealed up by the canvassers. The inspectors sealed the aperture through which the ballots were inserted. The canvassers did not remove these seals but delivered the boxes without other sealing. The statute is silent as to the mode or manner of sealing. The sealing up of the aperture was all that would seem to be necessary for safety in merely passing the boxes over to the canvassers. The only opportunity for fraud would be in putting in ballots, and the sealing of the aperture would be a sufficient protection. If the statute requires nothing more than sealing the aperture by the canvassers, then the adoption of the sealing by the inspectors, if it remained perfect, would be a sufficient compliance with the statute on their part.

It is quite apparent that for the purposes of protection it would be desirable that the boxes should be so sealed that they could not be opened without breaking the sealing, and, looking at the objects of this law and the great temptation and danger of fraud in tampering with the ballots, we think that this construction should be given to the act. Although the same expression, applied to the inspectors and canvassers might ordinarily be presumed to mean the same thing, yet if it can be seen that the purpose of the two sealings and the

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object to be effected are different the court should so construe the expression as to accomplish the object in each case. Besides, the words used are not identical. The twelfth section requires the inspectors to *securely seal* the boxes; the thirteenth section declares that they shall be *securely sealed up* by the canvassers.

When the canvassers received the boxes the apertures were sealed and they had no occasion to disturb such sealing. The statute evidently contemplates that the canvassers are to do something, and if anything, it must be something in addition to what has been before done by the inspectors. The object of their sealing is to preserve the identity of the boxes precisely as they were when they passed from their hands. To accomplish this the sealing must be done so that if disturbed it would be discovered, and when the statute says that the boxes must be sealed up and the object is patent, it follows that it requires the affirmative act of sealing on the part of the canvassers. Under the act of 1787 before referred to, the sheriff of each county received the ballots and delivered them to the secretary of State, after which a joint committee of the two houses of the Legislature canvassed the votes and announced the result. The act required the ballots delivered to the sheriff to be sealed up, so that if the seal was broken it would be discovered, and the expression in the act in question I think should be construed in the same way.

The contest between George Clinton and John Jay for governor in 1792 while this act was in force is interesting more as a historical incident than as a judicial precedent. Mr. Clinton was declared elected by rejecting the ballots in three counties, Otsego, Tioga and Clinton. The two latter would not have changed the result, but the rejection of the votes in Otsego, did change the result, and the votes of that county were rejected upon the ground that the person who carried the votes to Albany was not properly authorized to do so. The sheriff of that county had accepted an incompatible office and his successor had not qualified. He there-

fore acted as sheriff in receiving the ballots and deputed the bearer to deliver them to the secretary of State. This decision created great excitement, but Governor Clinton was sworn in and held the office.

Under the later decisions of the courts it is probable that the sheriff would have been regarded as an officer *de facto* and his acts as to third persons valid. (1 Ham. Political History, 62.)

Assuming the construction above indicated as to the sealing, the more important question remains whether, if it is proved satisfactorily that the boxes have been kept inviolate and undisturbed, the omission of the canvassers to seal up the boxes as contemplated, renders the ballots inadmissible as evidence.

The defendant strenuously insists that this omission is fatal to the admission of the ballots as evidence, and that considerations of public policy demand that this exceptional innovation upon the long established policy of the State in providing against such evidence by requiring the ballots to be destroyed should not be sustained unless the statute is strictly complied with.

There is plausibility and force in the argument but after careful consideration of the subject and the authorities bearing upon it, I have arrived, with some hesitation, at a conclusion adverse to the defendant's views. It is to be observed that the terms of the statute do not make the admissibility of this evidence depend upon a compliance with the requirements of the act. The statute does not create this evidence but impliedly recognizes it as evidence. It must be regarded as common law evidence. In *quo warranto* the returns and certificates are deemed only *prima facie* evidence and the parties are permitted to go behind them and show what took place at the election, the number of votes cast and for whom. An election is for the purpose of ascertaining the will of the electors and in controversies of this character that will may be shown by any available legal evidence. The ballots themselves are of course the highest and best evidence if they are

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actually preserved, but the liabilities of tampering and fraud doubtless induced the Legislature to require their destruction. But for the statute there can be no doubt of their being common law evidence if they are identified. The preservation of the boxes inviolate being the ultimate object of the statute if that is in fact accomplished the omission to observe all the formalities to secure that object is not fatal to the evidence. Such omission would weaken the force of the evidence and induce greater caution in regarding it, but would not necessarily destroy it. (*People v. Cook*, 8 N. Y., 67.)

We are without precedents in this State, but the tendency of the decisions in those States where similar laws exist favor this view. In *People v. Higgins* (3 Mich., 233), the aperture of one of the boxes was left unsealed and the court held that the provision was directory merely. The case seems not to have been very fully considered. In *People v. Cicott* (16 Mich., 283, 306), where there was imperfect sealing the trial judge charged that there was not the same certainty of their correctness which the law would otherwise have presumed, but submitted it to the jury to determine whether they would rely upon the inspectors' returns, or the recount of the ballots and this was approved by the appellate court. (See, also, *People v. Sackett*, 14 Mich., 320; *Pendat v. Ramsay*, 47 Miss., 24; *Hudson v. Solomon*, 19 Kan., 177.)

Judge COOLEY, who, I infer from his opinion, in *People v. Sackett* (*supra*), regarded with disfavor the evidence of a recount of the ballots, without a substantial compliance with the statute, recognizes the rule above stated. He says: "If however the ballots have not been kept as required by law and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all; or if received, that it should be left to the jury to determine upon all the circumstances of the case, whether they constitute more reliable evidence than the inspectors' certificate, which is usually prepared immediately on the close of the election, and upon an actual count

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of the ballots as then made by the officers whose duty it is to do so." (Cooley's Const. Lim., 625.)

This rule is quite as favorable to the admissibility of the ballots as can be justified, assuming that no defect or error appears in the returns, either upon their face or by evidence *aliunde*. In the case at bar the court ruled that the contents of no box should be allowed to be recounted without preliminary evidence tending to show some misconduct, omission or error in the returns. Evidence was given with that view as to the four districts where the discrepancies appeared before the boxes were opened. This evidence tended to show some error or incorrectness at least in making the returns, but it is not claimed that it established or scarcely tended to establish the precise difference which actually appeared by the recount. It was, however, pertinent and appropriate for the consideration of the jury in determining the credit which should be given them when brought in conflict with the ballots.

It was insisted that the boxes were not admissible for the reason that they were not properly kept. The statute does not prescribe the particular manner of keeping the boxes, but only that they shall be preserved undisturbed and inviolate. The evidence produced on the trial showed that they had been kept in the police department under the general supervision of the police officers. Members of the police force testified to the manner in which they were kept, and gave evidence tending to show their inviolability. Although it must be conceded that the security of the boxes was not made so perfect as to preclude the possibility, and even some probability that access might have been had to them for improper purposes, yet I do not think the judge would have been justified in deciding as matter of law that they had not been preserved inviolate, and withdrawing the question from the jury. It was a question of fact for the jury under proper instructions from the court.

The point that the ballots could only be counted for city officers is not tenable for two reasons: 1. The statute applies

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to all officers voted for in the city of Brooklyn, and no distinction is made either expressly or by implication between city, county and State officers. 2. If actually preserved the ballots would probably be admissible as common-law evidence even if the statute applied only to city officers.

It remains only to consider the treatment of the question by the trial judge in his charge. It is but just to say that the charge as a whole is very impartial and presents an able exposition of the various questions involved, but in laying down a rule for the guidance of the jury in respect to the ballot-boxes we feel constrained to hold that the learned judge committed a material error which may have operated injuriously to the defendant. At the close of his charge the judge used the following language: "If, on the other hand, you see any evidence * * * warranting you in believing that these boxes have been tampered with, and that a fraud has been committed by putting in ballots or taking out ballots after the election, you will reject these boxes entirely. But you must have evidence of the fact,—something you can point to and rely on,—before you can come to any such conclusion as that."

This language implies that affirmative evidence of actual tampering or fraud was necessary to justify the jury in disregarding the ballot-boxes. Subsequently the judge, in answer to a request of counsel, said: "There is no direct testimony, I charge you, in answer to a question that no witness has come on the stand and testified to the fact that these ballot-boxes have been tampered with. If you find that they have been it will be an inference from the testimony as to the mode in which they were kept and brought into court for examination of the case, and if you can find on examination, that there is room for such inference, on your part, then you will make that inference; and if you find there is not, you will not do it."

This may be regarded as a modification of the language first quoted to the extent that tampering or fraud might be inferred from circumstances, but the difference is more in

form than substance, for whatever may be properly inferred from circumstances is in a legal sense proved. In both, the jury were instructed that to justify the rejection of the boxes it must appear affirmatively by direct evidence or from circumstances that the ballot-boxes had been interfered with and a fraud committed. This was error. The error is in putting upon the party against whom the ballot-boxes are introduced the *onus* of proving that they had in fact been tampered with. The statute requires the ballot-boxes to be preserved undisturbed and inviolate, and it is incumbent upon the party offering the evidence to show that they had been so kept, not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. The burden was upon the relator to satisfy the jury that the boxes had remained inviolate. The returns are the primary evidence of the result of an election. They are made immediately upon canvassing the votes and the votes are canvassed at the close of the polls in public, and presumably in the presence of the friends of both parties. The result is at once publicly announced and duplicate returns are filed in different public offices. They may be impeached for fraud or mistake, but in attempting to remedy one evil, we should be cautious not to open the door to another and far greater evil. After the election it is known just how many votes are required to change the result, the ballots themselves cannot be identified.— they have no ear-mark. Everything depends upon keeping the ballot-boxes secure and the difficulty of doing this for several months in the face of temptation and opportunity, requires that the utmost scrutiny and care should be exercised in receiving the evidence, especially as the election of every county and State officer may depend upon a recount of the ballots in the city of Brooklyn under this act. Every consideration of public policy as well as the ordinary rules of evidence require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be shown with a

reasonable degree of certainty. If the boxes have been rigorously preserved the ballots are the best and highest evidence, but if not, they are not only the weakest but the most dangerous evidence. The jury might not be satisfied with the proof of identity, and yet be unable to find from the evidence that actual tampering or fraud had been committed. The question upon whom the burden of proof rests is deemed material, and an error in this respect has been held fatal. (*Lamb v. Camden and Amboy R. R. and T. Co.*, 46 N. Y., 271.) The rule becomes more important in a case like this, on account of the difficulty if not impossibility of ever proving actual fraud, and the grave consequences which may flow from the adoption of a contrary rule. The evidence tending to impeach the accuracy of the returns may or may not in a given case aid in supporting the boxes. If such evidence pointed to a mistake of fifty votes in one district and the box showed just that difference, it would be very persuasive evidence that the box was right, while evidence showing merely that the returns overran the poll-lists a few votes would not materially strengthen a ballot-box which showed a discrepancy of 100 votes. While, as we have seen, the judge was right in submitting the question to the jury whether the ballots were the identical ballots voted, and the jury might from the evidence have so found, yet they would have been warranted in coming to a contrary conclusion and in rejecting the boxes. They were not sealed up by the canvassers, and the manner of their keeping was loose and might have been deemed unsatisfactory. During the four or five months intervening between the election and the production of the boxes in court, they were specially guarded only fourteen days. A portion of them were retained for a considerable period in the public muster room of the station-house, another portion were kept a part of the time in the cellar of a station-house accessible from the interior of the building, and still another portion in the cellar of another station-house with a door leading to the sidewalk, fastened only on the outside by a

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common padlock. If the proper instructions had been given that it was incumbent upon the relator to prove that the boxes had remained undisturbed and inviolate, the jury might have found that the evidence fell short of establishing that fact, at all events we cannot say as matter of law that they would not have so found. The learned counsel for the relator in answer to this point insists, first, that the exception was not sufficiently specific. At the close of the charge several requests to charge were made by the respective parties, and then the case states that the defendant excepted to the closing of the charge in regard to the ballot-boxes. It would have been strictly more accurate to have repeated the language excepted to, but the exception referred to the close of the charge and the subject. There was but a single idea in that part of the charge, and that was expressed in clear and emphatic language. The exception could not have referred to anything else, and it is difficult to see how there could have been any misapprehension as to the application of the exception. We think that the rule requiring specific exceptions was substantially, if not technically complied with. The learned counsel also argued on the merits that any other rule than that laid down by the judge would require the relator to prove a negative that the boxes had not been tampered with. If the question is put in that form the duty of proving a negative would be upon the relator because upon the condition of inviolability only is the evidence of any value, but the proper form of the question is whether the boxes have been preserved undisturbed, and in that form the relator holds the affirmative. Upon the trial the relator assumed this burden and introduced evidence for that purpose, but the trial judge changed the *onus* to the defendant and substantially required him to prove that the boxes had not been kept inviolate. Mr. McCreary, in his work on Contested Elections, lays down, I think, the correct rule. He says: "Before the ballot-boxes should be allowed in evidence to overturn the official count and return, it should appear *affirmatively* that

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they have been safely kept by the proper custodian of the law, that they have not been exposed to the public or handled by unauthorized persons, and that no opportunity has been given for tampering with them. If this is believed to be a rule founded upon the presumption that a fraud or crime has been committed the answer is that the rule does no more than make choice between two presumptions of law which in this instance come in conflict and cannot both prevail" (page 209). This rule applied to the subject is eminently just, while a different one requiring that the fact of tampering should be made to appear to warrant the rejection of the boxes would lead to fraudulent practices and would be a dangerous innovation upon established rules.

Some of my brethren while concurring with the general views here expressed entertain doubts whether by reason of the omission to seal up the boxes and the insecure manner in which they were kept, a recount of the ballots ought to have been allowed to prevail over the returns, and this statement is made at their request.

The judgment must be reversed and a new trial ordered, costs to abide the event.

All concur, except EARL, J., not voting.

Judgment reversed.

CHARLES A. SWEET, Appellant, v. THE BUFFALO, NEW YORK AND PHILADELPHIA RAILWAY COMPANY, Respondent.

It is within the power of the Legislature, in authorizing land to be condemned for a public use which may be permanent, to determine what estate therein shall be taken, and to authorize the taking of a fee or any less estate in its discretion.

A fee may be taken, although the public use for which the land is to be taken is special and not of necessity permanent or perpetual.

Where a statute authorizes the taking of a fee it cannot be held invalid, or that an easement only was acquired thereunder, on the ground that an easement only was required to accomplish the purpose in view.

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The act entitled, "an act authorizing the common council of the city of Buffalo to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore or margin of Lake Erie" (chap. 547, Laws of 1864), authorized the taking of a fee in lands required for the purpose specified; and under proceedings for that purpose taken as prescribed by the act which gave to the city all the interest authorized by the act, it acquired an absolute fee.

The fact that the particular purpose for which the land was to be taken is expressed in the title and in the act does not qualify the estate taken; the purpose so declared simply regulates and defines the use for which the land shall be held.

The said act does not conflict with the provision of the State constitution (art. 3, § 16) declaring that a private or local act shall include but one subject, which shall be expressed in its title.

(Argued December 3, 1879; decided December 16, 1879.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of defendant, entered upon a decision of the court on trial without a jury. (Reported below, 13 Hun, 643.)

This was an action of ejectment to recover possession of certain premises in the city of Buffalo, over which defendant, under a license or permit from the common council, had laid its track.

The land in question had been taken by the city under and by virtue of proceedings under the act chapter 547, Laws of 1864.

A. P. Laning, for appellant. The act authorizing the common council "to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore or margin of Lake Erie," did not authorize the grant from the city to defendant. (*Gaskin v. Meek*, 42 N. Y., 186; *People v. Sup'rs Chautauqua Co.*, 43 id., 10; 1 Kent's Com., 415; 3 Bouvier's Inst., 95; *People v. McConville*, 35 N. Y., 449, 451; *People v. Briggs*, 50 id., 553; *People v. Com. of Palatine*, 53 Barb., 70; *People ex rel. v. Hills*, 42 id., 404; *Bradley v. Stephens*, 41 id., 619; *Sun Mut. Ins. Co. v. Meyer*, 8 N. Y., 253; *People v. McConn*,

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3 Parker, 299, 300; *Meyer v. Cegate*, 2 Kern., 146; *People v. Hills*, 35 N. Y., 452; *People v. O'Brian*, 38 id., 195.) That act is to be strictly pursued, and cannot be extended by implication, or beyond what is expressed, except as necessary to accomplish the purpose for which it was granted. (Potter's Dwarries on Stats., 257, 258; *Van Horn v. Dorrance*, 2 Dall., 316; *In re N. Y. C. and H. R. R. R. Co. v. Hip*, 46 N. Y., 546; *R. and S. R. R. Co. v. Davis*, 43 id., 137, 146; *Newell v. Wheeler*, 48 id., 486; *Ex parte Ward*, 52 id., 39.) The word "fee" is used in the act rather to create an interest *publici juris*, to continue so long as it is required for that purpose, and to the extent necessary to carry out the intention of the act. (2 Bl. Comm., 105; *People v. Kerr*, 27 N. Y., 196, 197; Smith on Stat. Construction, 659, 753; *Adams v. Wood*, 2 Cranch, 336; Sedgwick on Stat. Law, 224, 225; Sedgwick on Stat. Const., 235; 2 R. S., chap. 1, title 5, § 2; *Bridges v. Pierson*, 45 N. Y., 604; *Deuling v. Rogers*, 22 Wend., 489; *Crawford v. Delaware*, 7 Ohio [N. S.], 459; *Street Ry. v. Cummons ville*, 14 id., 541; *State v. Laverick*, 34 N. J., 201; *State v. Mayor*, 5 Porter, 279.) The city acquired under the act an easement or servitude in the land, and not the title. (*Pomeroy v. Mills*, 3 Vt., 280; 1 Crabb's Real Prop., 125, § 115.) The word "fee" is unquestionably used in the act with the general meaning of estate or title, and the particular kind of estate referred to is shown at once by the limiting words which follow. (*Hayward v. Mayor, etc.*, 7. N. Y., 315; *Baker v. Johnson*, 2 Hill, 348; *Br'klyn Park Com. v. Armstrong*, 45 N. Y., 234; *Rexford v. Knight*, 11 id., 308; *Sixth Ave. R. R. Co. v. Kerr*, 72 id., 530, 532; *Wash. County v. P. P. R. R. Co.*, 68 id., 591.) The rule applicable to all titles acquired by legislative appropriations of property to public or quasi public uses, limits such title to the contemplated use, and all else remains in the original owner. (*People v. Kerr*, 27 N. Y., 196; *Br'klyn Park Com. v. Armstrong*, 45 id., 240.) A greater estate or right in lands cannot be taken when an easement or a less estate will suffice, and there is no dif-

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ference between taking more land and taking a larger estate than is necessary. (*Barbow v. Townsend*, 1 M. & K., 506; *Hooker v. W. and N. T. R. Co.*, 12 Wend., 371; *Dunham v. Williams*, 36 Barb., 137; 2 Fonbl. Eq. [2d Eng. ed.], 132; 1 id., 439; 4 Kent Com. [5th ed.], 306; 1 Cruise Dig., 399, tit. 11, chap. 4, §§ 20, 32, 34; 2 Sanderson Uses, 79; 1 id., 97, 133, 140; *Van Epps v. Van Epps*, 9 Paige, 241; *Tony v. Bank of Orleans*, id., 649; 2 Story Eq. Juris., §§ 1199, 1200, 1256, 1258, 1261, 1262, 1265.) The right acquired under the statute is clearly an easement or servitude which may be defined as "a right which one proprietor has to some profit, benefit or lawful use, out of, or over the estate of, another proprietor." (*Ritgor v. Parker*, 8 Cush., 145; *Doe v. Wood*, 2 B. & Ald., 724; *Keiffer v. Imhoff*, 26 Pa., 438; Ired. Leading Cases, 107; 1 Ersk. Inst., 352; *Ex parte Coburn*, 1 Cow., 568; *Wolf v. Frost*, 4 Sanf. Chy., 72; *Ontank v. L. S. and M. S. R. R. Co.*, 71 N. Y., 194.) The plaintiff may maintain trespass against any one entered upon the land for any other purpose than to construct or maintain a sea-wall or ejectment to recover possession, if acquired for any other purpose, or an action to restrain the use or appropriation of the land, by which the owner's right will be impaired, or the burden upon his estate increased. (*Williams v. N. Y. C. R. R. Co.*, 16 N. Y., 97; *Creigh v. R. and B. R. R. Co.*, 37 id., 404; *Brondge v. Warner*, 2 Hill, 145; *Mahone v. N. Y. C. R. R. Co.*, 24 N. Y., 658; *Carpenter v. O. and S. R. R. Co.*, id., 655; *Wager v. Troy Un. R. R. Co.*, 25 id., 526; *Lozier v. N. Y. C. R. R. Co.*, 42 Barb., 465; *Wohler v. B. and S. L. R. R.*, 46 N. Y., 686.)

Sherman S. Rogers, for respondent. The proceedings under the act of 1864 gave the city the fee simple absolute of the land, and left no reversionary interest in the original owner. (*B'klyn Park Co. v. Armstrong*, 45 N. Y., 234; *Heywood v. New York*, 3 Seld., 314; *Rexford v. Knight*, 11 N. Y., 308; *Heard v. City of Brooklyn*, 60 id., 242.) The words "compensation and damages" are used as equivalents

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in said act. (*Un. Canal Co v. Young*, 1 Whart. [Pa.], 425.) The Legislature intended that the whole estate should be taken and paid for. (45 N. Y., 240; *Haldeman v. Penn. R. Co.*, 50 Pa. St., 439) Plaintiff has no interest in the land which would enable him to maintain either an ejectment or an action in equity. (*Williams v. N. Y. C. R. R. Co.*, 16 N. Y., 37; 1 Washb. on R. P. [m. p.], 451; *Nicholl v. N. Y. and Erie R. R. Co.*, 1 Kern., 131.)

ANDREWS, J. The right of the plaintiff to recover in this action depends upon the question whether the city of Buffalo by the proceedings taken under chapter 547 of the Laws of 1864 became vested with the fee of the land in controversy. If the title of the plaintiff's grantor was divested by the proceedings under the act the deed to the plaintiff conveyed no title or interest in the premises and he cannot maintain ejectment, and it is wholly immaterial whether the license from the common council of the city, under which the defendant entered upon and laid its track over the *locus in quo* was or was not valid. The plaintiff must recover on the strength of his own title, and if he has none, the question of the defendant's title is unimportant.

The act referred to is entitled "An act authorizing the common council of the city of Buffalo to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore or margin of Lake Erie." The first section authorizes the common council to lay out, make and open a public ground one hundred and thirty feet wide along the shore or margin of Lake Erie for the purpose of maintaining thereon and protecting a sea-wall or breakwater and to take and appropriate for that purpose certain specified lands including the premises in controversy. It provides that the land shall be "taken and appropriated" in the same manner and that compensation therefor shall be ascertained and made as provided in the charter of the city in proceedings for the taking of land for laying out streets and highways therein. Upon payment or tender of the compensation awarded to the

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owner or owners of the land taken, the section declares that "the fee thereof shall vest in the city of Buffalo for the purpose aforesaid and thenceforth the said land shall be and remain a public ground for the purpose of maintaining and protecting thereon or any part thereof a sea-wall or breakwater and protecting the harbor of said city and the lands adjacent from the encroachments of said lake" and that nothing in the act contained shall prevent the city from acquiring title to the lands described therein, for the purpose stated, by voluntary conveyance from the owner.

The second section provides that when the city shall have obtained "title to the land," either by proceedings under the act or by voluntary conveyance as therein authorized, "the said land shall be subject to the control of the common council of said city as one of the public grounds thereof, except so far as said control may have been heretofore or may be hereafter ceded to the United States," and it authorizes the common council to direct a deed or deeds of conveyance of such land, or any part thereof, to be made in the name of and under the corporate seal of the city to the United States, "for the purpose of erecting and maintaining thereon a sea-wall or breakwater," on condition, to be expressed therein, that the United States shall maintain and keep in repair on said land the said sea-wall or breakwater; and the section declares that "the execution and delivery of the deed or deeds shall vest in the United States the title to the land for the purpose and subject to the condition aforesaid." The third section prohibits the removal by any person from the premises of any earth, sand or gravel after the lands shall have been conveyed to or taken by the city under the act, without permission of the common council or the United States, as the case may be, or any excavation thereon so as to impair or injuriously affect the sea-wall or breakwater, and makes it a misdemeanor for any person willfully to tear down or remove any part thereof. The fourth section prohibits the erection of any building on the premises taken or conveyed under the act, and makes it a misdemeanor for any

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person after the land shall have been appropriated by or conveyed to the city to erect upon or move on to said land any building. The fifth section authorizes the common council to pass ordinances to prevent the erection or placing of any building on the land, or the taking of any earth, sand or gravel therefrom, and for the protection of the sea-wall or breakwater, and to impose penalties for a violation thereof. The sixth section requires the common council upon perfecting the proceedings for taking and appropriating the lands, or upon conveyances thereof, to declare by resolution "the said land to be a public ground for the purpose of maintaining and protecting a sea-wall or breakwater."

It is conceded that proceedings were instituted under this act to take the lands in question, and that by virtue of such proceedings all the interest in the premises in question which the city could acquire thereby became vested in the city. There is therefore no question of regularity to be considered, and it is to be assumed that compensation has been made or tendered to the owner of the land to the full extent authorized by the act. It is claimed, however, that under the act and proceedings thereunder the city acquired an easement only in the premises for the purpose of maintaining and protecting a sea-wall or breakwater, and that the fee of the land remained in the owner subject to this servitude.

This position, if it can be maintained, must rest upon the ground that it was not the intention of the act that a fee should be acquired by the city in the premises taken, and not upon the ground that there was any lack of power in the Legislature to authorize the acquisition by the city by compulsory proceedings of the fee of the land for the use mentioned in the act. The use was unquestionably a public one, and it is well settled that it is within the competency of the Legislature in authorizing land to be condemned for a public use which may be permanent, to determine what estate shall be taken, and to authorize the taking of a fee or any lesser estate in its discretion, and that a fee may be taken although the public use for which the land is to be taken is

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special and is not of necessity permanent or perpetual. (*Heyward v. The Mayor, etc.*, 7 N. Y., 214; *Rexford v. Knight*, 11 id., 308; *Brooklyn Park Comrs. v. Armstrong*, 45 id., 234.) It is true as claimed by the plaintiff's counsel that acts authorizing the taking of private property for public use are to be strictly construed and will not be deemed to justify the taking of any greater estate or interest than such as is expressly, or by necessary implication, authorized by the statute under which the application is made. (*The Washington Cemetery v. Prospect Park R. R. Co.*, 68 N. Y., 591; *Sixth Avenue R. R. Co. v. Kerr*, 72 id., 530.) But there is no other restraint upon the power of the Legislature to authorize land to be taken for public use, except that which imposes the condition of making compensation to the owners. When the statute authorizes the taking of a fee it cannot be held invalid, or that an easement only was acquired by proceedings thereunder, on the ground that in the judgment of the court the taking of an easement only would accomplish the public purpose which the Legislature had in view. That is a legislative and not a judicial question.

It seems very plain that the Legislature intended by the act in question to authorize the city of Buffalo to acquire by proceedings under the act the fee of the premises described therein. The lands are to be "taken and appropriated" for a use continuous and permanent in its character. The compensation is to be ascertained in the same manner as the compensation for lands taken by the city for streets and highways in which cases as the charter then was, the fee was taken, and there can be no question that the commissioners under the act of 1864 were authorized and required to award the full value of the land taken. The act declares that upon the payment or tender of the compensation award for the lands taken, "the fee thereof shall vest in the city," and the city, "after title to the land shall have been acquired," is authorized to convey to the "United States the said land or any part thereof." It is impossible in view of the clear and unambiguous terms of the statute, which vests in the city a

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fee in the lands taken under the act and the right to convey under the limitations mentioned, and provides for the payment to the owner of the full value of his property, to sustain the contention of the plaintiff that the city took an easement only, which is not a title or estate in land but a mere privilege therein distinct from any ownership of the soil. It is claimed that the interest taken by the city is for a special purpose, to wit: the maintaining and protecting of a sea-wall, and this purpose is repeatedly declared in the act. But we perceive no inconsistency in declaring the particular use for which the city is to take and hold the land, and at the same time providing that it should take a fee. The particular use declared is in the nature of a trust engrafted on the fee, and the people through its proper officer could compel the city to observe the trust, or restrain it from any use of the land inconsistent with it. The purpose expressed does not qualify the estate taken but simply regulates and defines the use for which it shall be held. The argument that the act makes provision for the protection of the property and authorizes the common council to do certain things which it would be unnecessary to provide for if the city became the general owner is not, we think, entitled to much weight, in view of the explicit declaration of the act that the fee of the land acquired under the act should vest in the city. The principle of construction that authorizes the examination of an entire statute or instrument to ascertain the meaning of any part, when the meaning is ambiguous or obscure, is well settled, but in this case there is no need of construction. The word *fee* has a clear, definite and legal signification and is wholly inconsistent with the claim that an easement in the land only was authorized to be taken.

The objection that the act is void under section 16 of article 3 of the constitution is not well taken. The title, we think, sufficiently indicated the subject of the act. It would be expected that in an act authorizing a municipal corporation to lay out a public ground provisions would be found for condemning land for that purpose. The conclusion is

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that the plaintiff failed to establish any right or title to the premises in question and the judgment must therefore be affirmed.

All concur.

Judgment affirmed.

ELIZABETH C. BENNETT, Respondent, v. WASHINGTON
GARLOCK, Appellant.

In 1808, Matthew and Martha Codd, the parents of plaintiff, being each the owner in fee of certain real estate, joined in a deed by its terms conveying to certain trustees named, "their heirs and assigns," all the lands, etc., of which the grantors, or either of them, were seized, in trust: 1st. To sell and dispose of so much thereof as should be necessary to pay all debts then subsisting against the grantors. 2d. To lease, etc., the residue, the net profits and avails to be paid Matthew during his life for the support of the grantors and their children; if Martha survived then to her during her life for the maintenance of herself and children. 3d. The trustees, the survivor of them and the heirs and assigns of said survivor, to hold all the residue not sold to pay debts, "for the sole use, benefit and behoof of such persons as shall be the right heirs" of the grantors at the time of the death of the survivor; reserving to the grantors power by will or appointment to direct to whom, upon the death of the grantors, the residue of the estate should go. 4th. Upon request of the grantors, in the discretion of the trustees, to sell and convey any portion of said lands. Plaintiff was living at the time of the execution of this deed. Martha, the survivor of the grantors, died in 1871. In an action of ejectment, commenced in 1874, to recover lands of which Martha was seized in fee at the time the deed was executed, defendant claimed by adverse possession commenced in 1842. *Held* (RAPALLO, J., dissenting), that by the deed the whole estate in law and equity was vested in the trustees, subject only to the execution of the trust; that the persons for whose benefit the trust was created took no estate in the lands, but simply an equitable interest, a right to enforce the performance of the trust in equity; that upon the death of her mother plaintiff became entitled to the rents and profits and to the actual possession of the lands remaining in the hands of the trustees; but that the remainder in the plaintiff was limited upon the trust estate, and if by the acts or the negligence of the trustee their estate had been defeated, or their right of action for its possession barred, the remainder was defeated, and plaintiff's right of action also barred; and that therefore the adverse possession was a good defense.

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Bennett v. Garlock (10 Hun, 328), reversed.

Nichol v. Walworth (4 Denio, 385) and *Norton v. Norton* (2 Sand., 296), distinguished.

(Argued January 23, 1879; decided January 13, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury, and granting a new trial. (Reported below, 10 Hun, 238.)

This was an action of ejectment to recover possession of the undivided third part of certain lands in the town of Frankfort, Herkimer county.

The plaintiff claimed as a remainderman under a deed of trust, executed by her parents, Matthew Codd and Martha, his wife, in 1808. The defendant claimed title by adverse possession under a tax sale deed, executed by the comptroller to one Charles Gray, on the 12th day of July, 1841, the sale having been made in 1839, for a tax which was assessed upon the premises in 1832.

The plaintiff was born in the year 1802, or 1803. On the 24th day of May, 1808, Martha Codd was the owner in fee of the premises described in the complaint, together with other lands; on that day she executed with her said husband, as parties of the first and second parts, to Samuel Sidney Breese, and Abraham Varick, jr., of the third part, and to their heirs and assigns, the trust deed in question. Said deed witnessed: "That the said parties of the first part, and second part, for, and in consideration of one dollar, to them in hand paid, and in order to effect the uses and trusts hereinafter particularly mentioned, have, and each of them, doth hereby grant, release and convey unto the said parties of the third part, and their heirs and assigns, all the lands, tenements, hereditaments and real estate, whatsoever or wheresoever, whereof they, the said parties of the first and second parts, are, or whereof either of them is seized or entitled to, either in law or equity, together with all and singular the

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rights, interest, property, and estate, which they, the said parties of the first and second parts, or either of them, have or hath, of, in or to said lands, tenements and real estate either in law or equity, wheresoever the same may be situated. To have and to hold the said lands, tenements, hereditaments, and premises, with their appurtenances, unto the said parties of the third part, and their heirs and assigns, as joint tenants. and not as tenants in common, in trust for the uses, intents and purposes following, to wit: First. For the intent and with full power and authority to said parties of the third part, and the survivor, and the heirs and assigns of such survivor of them to sell and dispose of so much of said lands, tenements and hereditaments, with the appurtenances, as shall be sufficient to pay and satisfy all debts, dues and demands now subsisting and founded in law or equity against them, the said parties of the first part, and second part, or either of them. *Secondly.* In trust as to the residue of said lands, tenements and hereditaments, to lease, manage, cultivate and improve the same in such manner and upon such terms and conditions as to said trustees, or the survivor of them, or the heirs or assigns of such survivor shall, from time to time, deem proper, and most for the interest and benefit of said parties of the first and second parts, or the survivor of them; the net profits, or avails whereof, are to be paid and accounted for to said Matthew Codd during his life-time quarterly, or as often as may be reasonably required by him for the support and maintenance of said Matthew and Martha Codd, and their children; and if said Martha Codd shall survive her said husband, then the said net profits or avails are to be paid and accounted for to her quarterly, or as often as may be reasonably required by her during her natural life for the maintenance of herself and said children. *Thirdly.* In trust, and upon this express intent that said trustees and the survivor of them, and the heirs and assigns of said survivor shall hold all the residue of said lands, tenements and hereditaments, with their appurtenances, over and above what may be sold as aforesaid for the payments of said debts,

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dues, and demands now subsisting as aforesaid, for the sole use, benefit, and behoof of such person as shall be the right heirs of them, the said Matthew and Martha Codd, at the time of the death of the survivor of them, that is to their children or grandchildren, or such other person as by the laws of the State of New York would be heir or heirs of the said Matthew and Martha Codd at the time of the death of the survivor of them, if this deed had not been made. Provided, however, and it is expressly intended that in order to secure the respect and obedience of their children and grandchildren, or other representatives, the said Matthew Codd and Martha Codd may, if they can agree and deem it proper by their joint-will or appointment in due form of law to be executed, direct and appoint the persons to whom and for whose use the said trust estate of the said residue of said lands shall go, upon the decease of the survivor of said Matthew and Martha Codd; which will or appointment so jointly executed as aforesaid, may be revoked or annulled by a proper instrument in writing, by either of said Matthew or Martha Codd at his or her pleasure, and, in case of such revocation, the said estate shall go to their right heirs aforesaid. Fourthly. It is understood and provided, that if at any time the said Matthew Codd and Martha Codd shall jointly, by a proper instrument in writing signed by them respectively, and attested by two subscribing witnesses, request the said trustees or trustee to sell and convey any portion of said lands over and above what may be necessary for payment of debts as aforesaid, the said trustees or trustee in case of survivorship, may, and is hereby authorized to comply with such joint-written request; but it is expressly understood and agreed that such request shall not be obligatory upon said trustees or trustee, but it shall be discretionary in said trustees or trustee to comply with such request or not."

There was a subsequent provision, declaring that the trustees should not be held accountable for net profits or avails until the same should be actually received by them,

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Breese and Varick, the trustees named in the deed, accepted the trust, and continued trustees until July 6, 1814, when by a decree of the Court of Chancery directing the same they executed a conveyance transferring said trust to Thomas Addis Emmett, as solé trustee, the conveyance being in form, to him, his heirs and assigns, upon the same trusts as held by Breese and Varick, and Emmett accepted the trust. Emmett died in 1827. In December, 1854, Thomas Cunningham was appointed trustee of said trust, and accepted the same, and in March, 1855, by conveyance duly executed by the heirs of Emmett, the trust estate was transferred to said Cunningham; the conveyance containing a full recital of the previous trust deeds, and proceedings in court in respect to the continuance and transfer of the trust. Martha Codd, whose name at the time of her death was Martha Bradstreet, died December, 1, 1871, leaving as her heirs at law the plaintiff, a son, and the children of a deceased daughter. No will or appointment was made by the grantors as provided for in said trust deed.

Henry A. Foster, for appellant. A tax sale deed, though made without authority, if apparently valid on its face, is a sufficient foundation for an adverse possession. (*Finley v. Cook*, 54 Barb., 10; *Hilton v. Bender*, 2 Hun, 1; *Blackwell on Tax Titles* [3d ed.], 568, 572; *Dillingham v. Brown*, 38 Ala., 311; *Prescott v. Nevers*, 4 Mason, 326; *Little v. Magginer*, 2 Maine, 176; *Brockett, Petitioner*, 53 id., 236; *Wells v. Company*, 47 N. H., 235, 260, 261.) Any deed or conveyance, though void, will lay a foundation for an adverse possession of the lands described in it. (*Lessee of Clark v. Courtney*, 5 Peters, 320, 354; *Jackson v. Newton*, 18 J. R., 355; *Northrop v. Wright*, 7 Hill, 477; *Jackson v. Wheat*, 18 J. R., 40; *La Frambois v. Jackson*, 8 Cow., 609; *Bradstreet v. Clark*, 12 Wend., 674; *Bogardus v. Trinity Church*, 4 Sand. Chy., 738, 739; *Humbert v. Trinity Church*, 24 Wend., 587, 604, 612, 613, 614, 632, 633, 638, 639, 640; *Kent v. Harcourt*, 33 Barb., 491.) The tax sale deed being

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fair on its face, no imputations upon the motives of the adverse holder are to be indulged, unless clearly proved. (*Clapp v. Bromagham*, 9 Cow., 531, 558, 559; *Sands v. Hughes*, 53 N. Y., 297.) A grantee always holds adversely to the grantor, as well as to all others. (*Bradstreet v. Huntington*, 5 Pet., 429, 448.) Even if Gray had been in possession under the mortgage, he could purchase the tax title for himself, and in hostility to Mrs. Bradstreet's rights, and of all others who claimed to own the premises. (*Hilton v. Bender*, 2 Hun, 1; *Nellis v. Lathrop*, 22 Wend., 121; *Ten Eyck v. Craig*, 62 N. Y., 406, 422, 423; *Link v. Doerfer*, 42 Wis., 391; 24 Am. Rep., 417; *Lessee of Ewing v. Burnet*, 11 Pet., 41.) The giving of a lease is, of itself, an assertion of title in the lessor. (*Wilklow v. Lane*, 37 Barb., 244, 248; *Northrop v. Wright*, 7 Hill, 477, 488.) One holding adversely, or otherwise, may purchase an outstanding title in support of his own, whether he doubts the validity of his previous title or not, and such purchase or purchases will not affect the right or title under which such purchaser previously claimed to hold. (*Northrop v. Wright*, 7 Hill, 477, 489, 495; *Burhans v. Van Zandt*, 7 Barb., 92, 102; *Jackson v. Newton*, 18 J. R., 355.) An actual, exclusive, open and notorious possession under a claim of title adverse to all the world, gives a good title. (*Cahill v. Palmer*, 45 N. Y., 478; *Kent v. Harcourt*, 33 Barb., 491; *La Frambois v. Jackson*, 8 Cow., 589; *Bogardus v. Trinity Church*, 4 Sandf. Chy., 634.) A possession adversely commenced is presumed to continue adverse so long as the possession is maintained. (*Bogardus v. Trinity Church*, 4 Sandf. Chy., 744; 1 Greenl. Ev., §§ 41, 42; *Wilkins v. Earle*, 44 N. Y., 192.) The question of adverse possession is a question of fact, to be proved by the claims, acts, motives, etc., of the disseizor, all of which are questions to be determined by the jury, or by the court when tried by the court alone. (Code of Procedure, § 272; Code of Civil Procedure, § 1338; *Booth v. Pierce*, 28 N. Y., 465; *Bradley v. Aldrich*, 40 id., 504; *Case v. Phelps*, 39

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id., 164, 167.) Where a trust is to the trustees and their heirs and assigns, if the trustee or trustees die, their heirs take the trust and hold it until the court shall see fit to appoint another. (*Wood v. Martin*, 38 Barb., 473; 44 N. Y., 249; *King v. Donnelly*, 5 Paige, 46; *McCarty v. Orphan Asylum*, 9 Cow., 437.) A trust to sell lands for the payment of debts necessarily conveys the fee of the lands to the trustees whether the words "heirs of the trustees" are inserted or not. (1 Perry on Trusts [2d ed.], § 315; *Anderson v. Mather*, 44 N. Y., 249; *Bain v. Matteson*, 54 id., 666.) The adverse possession having barred the legal estate of the trustees, it necessarily barred also any interest or estate, legal or equitable, which Martha Bradstreet had to the premises. It certainly barred all her interest as *cestui que trust*. (1 R. S., 729, § 60; *Nicoll v. Walworth*, 4 Den., 385; 4 Kent Com., 310, note *a*; *Amery v. Lord*, 5 Seld., 403; *Knox v. Jones*, 47 N. Y., 389, 396; 4 Kent, 233-310; Greenl. Cruise, 388, tit. 12, chap. 2, § 4; 2 Greenl. Cruise, 268, tit. 31, chap. 2, § 59; *Lewellin v. Mackwort*, 15 Vin. Ab., 125; Angel on Lim., §§ 166, 473; *Cholmondely v. Clinton*, 2 Merw., 361; *Hovenden v. Ld. Annesly*, 2 Sch. & Lef., 629; *Coleman v. Walker*, 3 Mctc. [Ky.], 45; *Smilie v. Biffle*, 2 Barr., 152; *Wyck v. East India Co.*, 3 P. Wms., 310.) No estate or interest in the "residue" ever vested in the plaintiff during the life of her mother. (*Silvester v. Wilson*, 2 Tr. Rep., 444, 451; *Neville v. Saunders*, 1 Vern., 415; *Knox v. Jones*, 47 N. Y., 390; *Hotchkin v. Humphrey*, 2 Mad. Chy., 374; *Bidefield v. Record*, 2 Sim., 354; *Young v. Robinson*, 8 Jur. [N. S.], 825; *Graves v. Simpson*, 10 id., 609; *Collier v. McBean*, 34 Beav., 426; *Fortescue v. Satterthwaite*, 1 Ired., 566; *Hargrave v. Cartier*, 3 Vez. & B., 79; *Doe ex dem. v. Hopkinson*, 5 Add. & Ell. [N. S.], 223; *Smilie v. Biffle*, 2 Barr., 52.) The plaintiff was incapable of taking a vested remainder under the trust deed as one of the right heirs of Matthew and Martha Codd. (1 Coke's Inst., 22, *b*; *Fenwick v. Mitford*, 1 Leon., 182; *Counden v. Clarke*, Hob., 30 *a*, 34 *a*; *Cholmondely v. Clinton*, 2 Mer., 222-223;

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Godolphin v. Abingdon, 2 Atk., 57; *Read v. Erington*, Cro. Eliz., 321; *Greenl. Cruise* [2d ed.], 328, Pl. ; 3 R. S. [2d ed.], 577; *Rogers v. Rogers*, 3 Wend., 521; *Campbell v. Rawdon*, 18 N. Y., 416, 417; *Sheridan v. Howe*, 4 Keyes, 569; *Moore v. Little*, 41 N. Y., 71, 72.) The statute of uses of 1787 (1 Greenleaf's ed. of the Laws 361, and 1 N. R. L., 72) has no application in this case. (*Chulleigh's Case*, 1 Coke's Rep., 126; 2 Washb. on Real Prop. [4th ed.], 410, Pl. 11; *Ref. Dutch Church v. Veeder*, 4 Wend., 492.) As already appears there was no life estate created by the deed in Mr. and Mrs. Codd; but only a life interest in the net profits and avails, and a remainder, either legal or equitable, could not be limited on that. (Gerard's Title to Real Estate, 217; *Doe v. Consadine*, 6 Wall., 474; *Leslie v. Marshall*, 31 Barb., 567; *Fearne on Remainders*, 281; *Goodright v. Cornish*, 1 Salk., 226; *Doe v. Carlton*, 1 Wilson, 225, 226; *Harris v. Barnes*, 4 Bar., 2157, 2162; 4 Kent's Com., 199; 2 Blk. Com., 164; *Jackson v. Robbins*, 16 J. R., 537, 589; *Preston v. Funnel*, Willes' Rep., 164; *Pell v. Brown*, Cro. Jac., 590.) During the life of her mother plaintiff had not, at common law, even an estate "in expectancy," but a mere "possibility of a use." (3 R. S. [2d ed.], 570, 571; *Bouvier's Law Dictionary*, "Springing use"; 4 Kent's Com., 295, 298; *Moore v. Little*, 41 N. Y., 93; *Bouvier's Law Dict.*, "Possibility;" 1 Hilliard on Real Prop., 34; *Pelletrieu v. Varick*, 11 Wend., 110; *Jackson v. Waldron*, 13 id., 178; *Edwards v. Varick*, 5 Denio, 664, 691; *Boynton v. Hubbard*, 7 Mass., 112; 10 Coke's Rep., 51; *Miller v. Evans*, 19 N. Y., 384, 390, 395; 3 Washb. Real Prop. [4th ed.], 94, Pl. 15.) As plaintiff had no vested estate in remainder, as to whatever other right or interest which she had in the trust estate, she was *cestui que trust* to the trustees, as well as to the trust for the maintenance, and she should compel the trustee to protect that interest. (Perry on Trusts [2d ed.], §§ 15, 17, 326, 346, 357, 621, 816; *Griffin v. Ford*, 1 Bosw., 124; *Wormley v. Wormley*, 8 Wheat., 421; *Hubbard v. Medbury*, 53 N. Y., 99;

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Willard on Real Estate, 158, 172.) Under a legacy to the issue of A., all descendants are entitled, and take *per capita* as joint tenants. (*Davenport v. Hanberry*, 3 Ves., 257; *Leigh v. Norbury*, 13 id., 340, 344; Bouvier's Law Dict., "*Per Capita*.")

Edward C. James, for respondent. If, by the trust deed of May 24, 1808, plaintiff became vested with a future or expectant estate in the lands, whether legal or equitable, then a title by adverse possession against such estate during the continuance of the life estates was impossible, as no possession can be deemed adverse to a party who has not, at the time, the right of entry and possession. (*Webster v. Cooper*, 14 How. [U. S.], 488; *Carver v. Jackson*, 4 Pet., 1; *Christie v. Gage*, 71 N. Y., 189, 192-193; *Pratt v. Pratt*, 6 W. Dig., 407; *Devyr v. Shaefer*, 55 N. Y., 446; *Jackson v. Schoonmaker*, 4 J. R., 390; *Jackson v. Sellick*, 8 id., 262; *Jackson v. Johnson*, 5 Cow., 74; *Jackson v. Mencius*, 2 Wend., 357; *Clark v. Hughes*, 13 Barb., 147; *Randall v. Rabb*, 2 Abb. Pr., 307; *Wells v. Prince*, 9 Mass., 508; *Wallingford v. Hearl*, 15 id., 471; *Doe v. Edmonds*, 6 M. & W., 295; 1 R. S., 725, § 32.) A trustee takes that quantity of interest only which the purposes of the trust require and the instrument creating it permits. The legal estate is in the trustee so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled. (*Nichol v. Walworth*, 4 Den., 385, 388; *Norton v. Norton*, 2 Sandf., 296; *Poor v. Considine*, 6 Wall., 458, 471; *Adams v. Adams*, 6 Q. B., 860, 866; Perry on Trusts, §§ 319, 320; 1 R. S., 730, § 67; *Bellinger v. Shafer*, 2 Sand. Chy., 293.) There was no proof of any debts existing against the grantors at the time this deed was made, and hence this trust is not shown to have ever had vitality. (*Heardson v. Williamson*, 1 Keen, 33, 41; *Ward v. Barbury*, 18 Beav., 190; *Selden v. Vermilyea*, 3 N. Y., 525; *Kettel v. Osborn*, 3 T. & C., 45; *James v. Bion*, 2 Sim. & Stu., 600.) The presumption of payment will attach after twenty

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years, notwithstanding the trust. (*Martin v. Gage*, 9 N. Y., 398; Laws of 1875, chap. 545; *Carter v. Barnardiston*, 1 P. Wms., 518; 1 Salk., 153.) As under the trust the grantors could pay their own debts, had debts existed, the trustees would have taken only a power. (*Kenrick v. Lord Beauclerk*, 3 Bos. & Pul., 175; *Kimber v. Cafe*, 7 Exch., 675; *Hamton v. Shotter*, 8 Ad. & Ell., 905; Perry on Trusts, § 308.) Had the trustees taken an estate under the clause to pay debts, it would attach only to so much of the lands as would be sufficient to pay the debts then existing, a quantity which could have been immediately ascertained. (*Hawker v. Hawker*, 3 Barn. & Adol., 537.) The existence of such an estate in the trustees would not prevent the remainders, limited upon the residue, vesting as legal estates. (*Popham v. Bumpfield*, 1 Vern., 79; *Glover v. Monckton*, 3 Bing., 13; *Collier v. McBean*, 34 Beav., 426; *Muller v. Claridge*, 6 Com. B., 641; *Warter v. Hutchinson*, 1 Barn. & Cres., 721; *Ackland v. Lutley*, 9 Ad. & Ell., 879, 893; *Jones v. Say*, 3 Brown's Parl. Cas., 458; *Ward v. Amory*, 1 Curtis C. C., 419, 428; *Carver v. Jackson*, 4 Pct., 1.) On the expiration of the lives of Matthew and Martha Codd, the purposes of this trust would cease, and the estate of the trustees would then also cease. (2 Jarman on Wills, 213, 214; *Welch v. Allen*, 21 Wend., 147; *Blacker v. Anscombe*, 4 Bos. & Pul., 25; *Bain v. Matteson*, 54 N. Y., 663.) Under the third clause of the trust deed of 1808, the plaintiff, who was living when said deed was executed, became immediately vested with a legal estate in remainder, limited by way of use. (2 Washb. on Real Estate, chap. 2, §§ 2, 8; 4 Kent's Com., 205, 237; 1 Saunders on Uses, 105, 106; 1 Cruise, tit. XI, chap. 3, §§ 5, 19, 22, note 1; 2 id., tit. XVI, chap. 5, §§ 1, 15, 16, 17; *Reformed Dutch Church v. Veeder*, 4 Wend., 494; *Carver v. Jackson*, 4 Pct., 1, 90; *Jones v. Say*, 3 Brown's Parl. Cas., 458; *Shapland v. Smith*, 1 id., 75; *Hallan v. Ironmonger*, 3 East, 533; *Terry v. Collier*, 11 id., 377; *Silvester v. Wilson*, 2 Term, 444; *Willis v. Martin*, 4 id., 39; *Foster v. Hayes*, 2 El. & Bl., 27; 4 id., 717;

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Lewin on Trusts, 253, 254; *Webster v. Cooper*, 14 How. [U. S.], 488, 497-498; *Ward v. Amory*, 1 Curtis C. C., 419; *Ware v. Richardson*, 3 Md., 505; *Green v. Green*, 23 Wall., 486, 491; *Vanderheyden v. Crandall*, 2 Denio, 9; 1 N. Y., 491; *Bellinger v. Shafer*, 2 Sand. Chy., 293; 68 N. Y., 61; 4 Kent Com., 205; *Barnes v. Provost*, 4 J. R., 61; *Nodine v. Greenfield*, 7 Paige, 544, 548; *Right v. Creber*, 5 Barn. & Cres., 866; *Bills v. Hopkinson*, 5 Q. B., 223; *Comerback v. Perryn*, 3 Term., 484; *Williamson v. Field*, 2 Sand. Chy., 533; *Moore v. Littel*, 41 N. Y., 60; *Provost v. Colyer*, 62 id., 545, 552; *Willis v. Martin*, 4 Term., 39, 63; *Cunningham v. Moody*, 1 Ves. Sr., 174, 177; *Foster v. Hayes*, 2 El. & Bl., 27; 4 id., 717; *Jones v. Say*, 3 Brown's Parl. Cas., 458; *Shapland v. Smith*, 1 Brown's Chy. Cases, 75; *Hallan v. Ironmonger*, 3 East, 533; *Terry v. Collier*, 11 id., 377; *Hayward v. Whitby*, 1 Barr., 228; *Blaker v. Anscombe*, 4 Bos. & Pul., 25; *Warter v. Hutchinson*, 5 Moore, 143; 1 B. & C., 721; *Green v. Green*, 23 Wall., 486, 491; *Silvester v. Wilson*, 2 Term, 444; *Collier v. McBean*, 34 Beav., 426; *Mogg v. Mogg*, 1 Meriv., 654, 678, 689; *Playford v. Hoare*, 3 Y. & J., 175; *Muller v. Claridge*, 6 M. G. & S., 641; *Thurston v. Thurston*, 6 R. I., 296; *Biscoe v. Perkins*, 1 V. & B., 485; *Curtis v. Price*, 12 Ves., 89; *Turner v. Dorvell*, 5 Term, 518; *Littledale v. Smeddle*, 2 B. & Ald., 126; *Owen v. Smith*, 2 H. Bl., 594; *Marshall v. Hill*, 2 M. & S., 608; *Mott v. Buton*, 7 Ves., 201; *Phipps v. Ackers*, 9 Cl. & Fin., 583; 4 M. & G., 1107; *Booth v. Edlin*, 4 Ad. & El., 582, 591; *Clarke v. Davenport*, 1 Bosw., 95, 114, 115; *Pitcher v. Carter*, 4 Sand. Chy., 1; *Wood v. Mather*, 38 Barb., 473; 44 N. Y., 249; 4 Kent's Com., 216, 310, note *d*; *Nicoll v. Walworth*, 4 Den., 385; 68 N. Y., 234; *Manice v. Manice*, 43 id., 303, 370, 373; *In re Livingston*, 34 id., 555; 4 Kent, 243, 245, 246.) The Revised Statutes having taken effect many years before the adverse entry under which defendant claims, plaintiff is entitled to the benefit of all those provisions by which formal trusts were turned into legal estates, and all other provisions

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not altering or impairing any vested estate, interest or right, or altering or affecting the construction of this trust deed. (*Bellinger v. Shafer*, 2 Sand. Chy., 293; 1 R. S., 750, § 11; *Manice v. Manice*, 43 N. Y., 303, 370; *In re Livingston*, 34 id., 555; 44 id., 249; 1 R. S., 729, § 61; id., 723, § 10; id., 725, § 32.) Plaintiff's estate under the trust deed was a vested legal remainder. (*Vanderheyden v. Crandall*, 2 Den., 9; 1 N. Y., 491; *Carver v. Jackson*, 4 Pet., 1; *Webster v. Cooper*, 14 How. [U. S.], 488; *Ward v. Amory*, 1 Curtis C. C., 419.) Even if plaintiff's estate in remainder had been an equitable estate during the lives of her parents, it would not be barred by the statute of limitations. (*Williamson v. Field*, 2 Sand. Chy., 533, 562; Cruise, tit. XII, chap. 1, § 34; *Burgess v. Wheate*, 1 Eden, 177, 223-224; *Cholmondely v. Clinton*, 2 Jac. & W., 1, 148; *Croxall v. Shererd*, 5 Wall., 268, 281; *Walton v. Walton*, 7 J. Chy., 258, 273; *Selby v. Alston*, 3 Ves. Jr., 339, 341; 1 R. S., 730, § 65; *Lochmere v. Carlisle*, 3 P. Wms., 215; *Decouche v. Savetier*, 3 J. Chy., 190, 216; *Kane v. Bloodgood*, 7 id., 90-126; *Hubbell v. Medbury*, 53 N. Y., 98; Perry on Trusts, §§ 863, 866, 858; *Elmendorf v. Taylor*, 10 Wheat., 152; *L. Ass. Scotland v. Siddall*, 3 De S., F. & J., 58, 73; *March v. Russell*, 3 M. & C., 32; Perry on Trusts, §§ 467, 850, 858, 860; *Allen v. Sayer*, 2 Vern., 368; *Torry v. Black*, 3 W. Dig., 131; *Thompson v. Simpson*, 1 Dr. & War., 459, 489.) Plaintiff's estate under the trust deed is a fee simple. (1 Coke Inst., 10, a; 4 Greenl. Cruise, tit. 32, chap. 21, § 90; 1 Washb. Real Est., chap. 3, § 58; *Provost v. Colyer*, 62 N. Y., 545, 549, etc.; *Saunders v. Hanes*, 44 id., 353.) A deed in the form of a bargain and sale will be construed as a feoffment to uses, whenever such construction is necessary to execute the uses declared thereon, according to the intent of the parties. (*Thatcher v. Mans*, 3 Pick., 521; *Durant v. Ritchie*, 4 Mason, 45, 69; *Ware v. Richardson*, 3 Md., 555; *Green v. Green*, 23 Wall., 486; *Bryan v. Bradley*, 16 Conn., 474; *Cheney v. Watkins*, 1 Har. & J., 527.) The technical English rule, that a use cannot be executed upon a use,

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if allowed its fullest scope, does not affect this trust deed. It applied only to strict uses or passive trusts. (4 Denio, 385; Perry on Trusts, § 312; *Roe v. Tranmarr*, Willes, 686; Greenl. Cruise, tit. XVI, chaps. 5 and 8; 2 Washb. R. E., chap. 4, 263, chap. 5, 276-282; 4 Kent Com., 238-248, 257-263; *Wyman v. Brown*, 50 Me., 139, 157, 158; *Rogers v. Eagle F. Co.*, 9 Wend., 630, 637-641; *Vander Volgen v. Yates*, 9 N. Y., 219, 223; Lewin on Trusts [3d ed.], 253-254; *Ware v. Richardson*, 3 Md., 555; *Cheney v. Watkins*, 1 Har. & J., 527; 1 R. S., 727, §§ 45-48; id., 750, § 11; Reviser's Notes, 3 R. S. [2d ed.], 582-583; 23 N. Y., 377-380.) Gray & Hinman were chargeable as constructive trustees. (Perry on Trusts, §§ 217, 828, 829, 830; *Van Epps v. Van Deusen*, 2 Paige, 64, 71.) To establish a title by adverse possession it is necessary to prove that the occupant, or those under whom he claims, entered into possession under claim of title, exclusive of any other right, and had a continuous and uninterrupted possession of the premises for twenty years under such claim exclusively. (2 R. S., 294, §§ 9, 11; Code, §§ 82, 84; *Lytle v. Beveridge*, 58 N. Y., 593, 606; *Colburn v. Morton*, 1 Abb. Ct. App. Dec., 378, 384; *Burhans v. Van Zandt*, 7 N. Y., 523.) Gray having had notice of the defects in the tax title, as to him they are as fatal as if the want of authority had appeared on the face of the deed. (*Finlay v. Cook*, 54 Barb., 10, 23; *Hilton v. Bender*, 2 Hun, 1; *Van Rensselaer v. Whitbeck*, 7 N. Y., 517; *Westfall v. Preston*, 49 id., 349, 355; *Johnson v. Elwood*, 53 id., 431; *Curtis v. Follett*, 15 Barb., 337.) This being a trust created for a married woman, was a valid express trust which vested the legal title in the trustee. (Laws of 1849, ch. 375, § 3; Perry on Trusts, § 310; *Ware v. Richardson*, 3 Md., 505; *Greene v. Greene*, 23 Wall., 486; *Ayer v. Ayer*, 16 Pick., 327; *Burhans v. Van Zandt*, 7 N. Y., 523; *Calkins v. Isbell*, 20 id., 147.)

DANFORTH, J. Upon the facts found and conceded the plaintiff is entitled to recover the premises in question, unless

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they were held adversely for twenty years before the commencement of the action. This was the defense spread out in the answer and relied upon at the trial. The trial court found and there was evidence to sustain the finding that the person under whom the defendant claimed, on the 26th day of March, 1842, entered into possession of the premises under claim of title exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, — that from that time there had been a continual occupation and possession of the same, and therefore the defendant had judgment. The question of fact thus found has not been disturbed by the General Term. The judgment was reversed upon the ground that the plaintiff's estate in the premises was a vested remainder created by deed from her ancestor to Messrs. Breese and Varick, trustees, dated May 24, 1808, but that her right of entry and possession did not accrue until 1871, and as the action was commenced in 1874 the statute was not a bar. The judgment to be given upon this appeal then depends upon the construction of that instrument. It was executed by Matthew and Martha Codd — Martha was the owner in fee of the premises conveyed, of which the land in controversy forms a part, Matthew was her husband, and the plaintiff their child and living, at the time of the execution of the deed. By that deed the grantors in consideration, as it is stated, of one dollar and in order to effect the uses and trusts mentioned, did grant, release and convey unto the trustees above named and their heirs and assigns all the lands, etc., whereof they the said Matthew and Martha were or either of them was seized or entitled to either in law or equity, in trust. First. To sell and dispose of so much of said lands, etc., as shall be sufficient to pay all debts and demands then subsisting against the grantors or either of them. Secondly. In trust as to the residue of said lands to lease, manage, cultivate and improve the same in such manner and upon such terms and conditions as to the said trustees or the survivor of them or the heirs or assigns of such survivor shall from

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time to time seem proper and most for the interest and benefit of said Matthew and Martha or the survivor of them, the net profits and avails whereof are to be paid to Matthew during his life-time for the support and maintenance of Matthew and Martha and their children, and if Martha survives Matthew, then to her during her natural life-time for the maintenance of herself and children. Third. That the said trustees and the survivor of them, and the heirs and assigns of said survivor, shall hold all the residue of said lands over and above what may be sold as aforesaid for the payment of said debts, for the sole use, benefit and behoof of such persons as shall be the right heirs of them the said Matthew and Martha at the time of the death of the survivor of them; that is to their children or grandchildren or such other person as by the laws of the State of New York would be heir or heirs of the said Matthew and Martha Codd at the time of the death of the survivor of them if this deed had not been made. Reserving to the grantors however power by will or appointment to direct to whom upon the death of the grantors the trust estate or the residue of the lands should go. Fourth. Upon request made by the grantors the trustees were authorized in their discretion to sell and convey any portion of said lands "over and above what may be necessary for payment of debts." The validity of this instrument is not called in question by the plaintiff, nor could it be, nor can she be permitted to deny the existence of facts assumed by it, and in consequence of which the various trusts were created. For she introduced it in evidence as part of her case and as the foundation of her title. It was however before the Commission of Appeals, and it was by that court held that the trusts were valid, that the trustees took the legal title, and that Martha Codd had no title or interest in the premises, save the power of appointment by will. (*Bain v. Matteson*, 54 N. Y., 663.) This power was never exercised. The defendant prevailed at the trial upon the ruling of the trial judge that the whole estate in law and equity was vested in the trustees subject only to the execution of the

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trust, that the persons for whose benefit the trust was created took no interest or estate in the lands, but a right in equity to enforce the performance of the trust; and the judgment was reversed upon the theory that the trustees took no greater interest in the lands conveyed than the purposes of the trust required; that if any debts existed they must be presumed extinguished prior to 1871; that the other trust ceased with the death of Martha Codd and that the plaintiff took a vested remainder in fee, which by virtue of the statute of uses was a legal estate and was by it executed at the death of Martha Codd. The existence of the general doctrine in regard to the extent of the estate of the trustees is not questioned, but its application to the case in hand is denied. First, it is to be noticed that the grant is unto Breese and Varick "and their heirs and assigns" of all the lands, etc., whereof the grantors "are or" whereof either of them is seized or entitled to either in law or equity, etc., "in trust for the uses above stated." By these words the trustees *prima facie* at least take an estate in fee and are invested with all the legal and equitable rights of the grantors (1 Perry on Trusts, § 315), and even without these words if the trusts could not be fully executed, except by the trustees taking an inheritance, their estate would be enlarged into a fee simple to enable them to carry out the intention of the grantors "and this" says KENT, C. J. "has been frequently ruled in chancery. And the Court of Kings Bench, in the time of Lord MANSFIELD, made the same decision at law." (*Fisher v. Field*, 10 John., 504.)

In the case before us, there is a trust to sell, and a trust to lease; to perform these duties the trustees must have a fee—a less estate would not be sufficient to satisfy the purposes of the trust. (1 Perry on Trusts, § 315; *Collier v. Walters*, L. R. [17 Eq. Cas.], 252.)

Now what are the trusts here; the first is to sell so much of the lands as shall be sufficient to pay and satisfy all debts, dues and demands then subsisting against the grantors or either of them. By the terms of the deed it is made the duty

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of the trustees to sell,—for that purpose a fee is necessary—again it is said that if “a fee be given in terms with trusts which by their nature extend over an indefinite time the estate cannot be cut down.” (*Doe v. Davies*, 1 Q. B., 430.) Here no time is fixed for the payment of the debts provided for, and the case in that respect is like *Collier v. Walters* (*supra*). It is plain that no precise period for the continuation of the trust is mentioned nor could it have been ascertained at the time of the execution of the deed. Again, this power extends to the whole land conveyed and is not confined to any particular piece or parcel of it. The force of the argument then would not be weakened if we knew that the debts could be paid from the proceeds of a small portion and that the whole of the land would not be required for that purpose, the question being what estate was conferred upon the trustees; what ever estate was conferred must vest as to the whole. In *Collier v. Walters* (*supra*), it is stated by the master of the rolls as a rule collected from all the authorities “that you cannot cut down the estate in fee simple unless you can point out on the face of the will what less estate the trustees take.” That has not been done in this case.

In *Nichol v. Walworth* (4 Denio, 385), JEWETT, J., says: “The rule at common law as well as by statute is that the trustee takes that quantity of interest only which the purposes of the trust require and the instrument creating it permits. The legal estate is in the trustee so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled.” And this is cited by the respondent in support of the doctrine on which the judgment of the General Term was placed. The grant in that case was unlike the one before us — there were no words of inheritance — it was unaccompanied by any power to sell or of management on the part of the trustee. The trust was simply to receive the rents, issues and profits of the land and apply the same to the support of a person named, upon the express condition that the same should not be sold during her life, but held for the purpose stated, and the grantor

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added, after her death "I give, grant and convey the said premises to my natural daughter Mary," etc. There the trustee took an estate for the life of the person named in trust for her, and the limitation in remainder after her death was directly to Mary in fee.

Norton v. Norton (2 Sand., 296), also cited by respondent, is not in conflict with these views. The plaintiff claimed a life estate in the premises as tenant by the curtesy. This was denied, and upon the hearing it appeared that J. L. N. had theretofore granted unto one Hannah Clinton, her executors, etc., all the estate which as husband of Sarah Norton he had in her land in trust for Sarah, giving her power through her said trustee to dispose of the property, collect rents, etc. The questions before the court turned on the effect of this conveyance. It was held that it did not convey the fee; the court saying: "The purpose of this trust was first for Mrs. Norton and second to empower her through her trustee to dispose of the property, manage it, and collect the rents; the first object and all of the second, except the power of disposal, were attainable by a trust which should cease on her death. For those objects therefore the estate of the trustee cannot be deemed to have extended beyond her life; the power of disposing of the property is limited to her alone; there is no limitation in favor of her heirs or devisees, nor any language from which an intention is to be inferred that others were to execute the power." It was held that the trust ceased on Mrs. Norton's death, and that the plaintiff had a legal estate as tenant by the curtesy. There were no words of inheritance; none from which an intent could be inferred of a greater estate than for the life of Mrs. Norton, nor any object to be accomplished which required it. In the case before us it is quite otherwise. It is claimed by the respondent that the estate of the trustees ceased when the purposes of the trust were accomplished, and assuming that the debts were paid the death of Mrs. Codd put an end to the trust estate. This must be so, but then and for nearly thirty years before that time, the trustees, holders of the

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legal estate, had neglected to assert their title. As against them the defendant had a good title by adverse possession. (Perry on Trusts, § 858; Hill on Trustees, * 267; *Lewellen v. Mackworth*, 2 Eq. Ca. Abr., 579; *Hounden v. Lord Annesley*, 2 S. & Lef., 629; *Pentland v. Stokes*, 2 Ball & B., 175.)

What estate has the plaintiff? Not a legal estate in fee, for as we have seen the whole legal estate vested in Breese and Varick as trustees. Martha Codd had an equitable estate for life, her children, of whom the plaintiff was one, an equitable remainder liable to be defeated by dying before their mother, or in part by after-born children who at the time of the mother's death should be living. The estate or interest cannot be more than this. Although the plaintiff was living when the trust was created, she is not named in the deed nor is she referred to as one then in existence. There is even no provision made for children then *in esse*. The beneficiaries are those who as child or grandchild, or those failing, others, are entitled to inherit who shall be living when the mother dies. The plaintiff happens to be one of them; and for that reason and not because she was living at the time of the execution of the deed, she takes an interest, which for the reason above stated can be an equitable one merely. *Wood's Case* in the Supreme Court under the name of *Wood v. Mather* (28 Barb., 473), and in the Court of Appeals as *Anderson v. Mather* (44 N. Y., 249), sustains this construction.

The defense, good against the trustees, is good against the plaintiff also. They, had the whole legal and equitable estate; she, an equitable interest only upon the strength of which she could enforce the performance of the trust in equity. At the death of her mother, Martha Codd, the plaintiff became entitled to the receipt of the rents and profits and to the actual possession of the land then in the hands of the trustees; she could have no more. Whatever way it was conveyed to her, by the trustees themselves or by force of the statute, she took subject to the acts of the trus-

tees and became bound and affected by their affirmative acts, and by their neglects. If by their neglect or consent an estate had been acquired by the defendant, or he had obtained an advantage which prevented the trustees from asserting their title, the plaintiff standing in their place is equally estopped and prevented. In *Jackson v. Johnson* (5 Cow., 74), the grant was to A. and his heirs in trust for the children of B. SAVAGE, C. J., says: "A. was authorized to sell the lands to reimburse advances which it was contemplated he would make, and in fact did make. He took the legal estate and the heirs only an equitable one." * * *

His (A.'s) acts were valid and binding upon those heirs, and when he conveyed to them the legal estate they took it subject to such equitable interests as the defendant and others had acquired in the lands by virtue of the acts of the trustees. In *Smilie v. Biffle* (2 Barr., 52), the court say: "Where *cestui que trust* and trustee are both out of possession for the time limited, the party in possession has a good bar against both." If for any reason the estate of the trustees had been void at its creation, the remainder in the plaintiff, however it may have been termed, would have been void also; for it is limited upon the trust estate. So if the estate of the trustees is defeated in any way, or if their right of action for its possession is barred, the remainder must be defeated and the plaintiff's right barred, because it rests upon the same title.

But the plaintiff insists that this does not affect her, and as the foundation of her claim asserts, first, that on the execution of the trust deed she became vested with a legal estate in remainder limited by way of use, and second, that the statute did not run against her right of action until by her mother's death, she was entitled to possession, and if this is so she is entitled to recover. But how can that be? That the trustees were clothed by appropriate words with all the legal and equitable interests of Matthew and Martha Codd, cannot be denied, and with the language the purpose of the trust concurs. They may sell, of course they may give a good

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title as full and perfect as that possessed by the grantors. (*Brewster v. Stryker*, 2 Comstk., 19.) A title during the life of Martha Codd would clearly not be such an one. A title subject to a vested remainder in fee would be anything but unincumbered, and yet if the plaintiff is right, such a title is the only one the trustees could give, for that remainder extended to all the lands referred to in the deed. And nothing short of this will aid the plaintiff; for if she did not take a vested remainder at the time of the execution of the deed she would afterwards stand in the place of the trustees and be subject to their acts with no better right of action than they had. There is no ground on which the plaintiff can recover.

The order of the General Term should be reversed, and the judgment of the Special Term affirmed.

RAPALLO, J. (dissenting). I will as briefly as possible state the reasons for my dissent from the conclusion of the majority of the court in this case.

After examination I arrived at the following conclusions, First. That the question whether the remainder limited to the heirs of Matthew and Martha Codd was vested or contingent, is not important. The trustees were, on the death of Matthew and Martha Codd, to hold the land *to the use* of their heirs. Even if contingent this was a legal estate in remainder, to take effect as such on the termination of the trust estate granted to the trustees. It was in legal effect a remainder in fee, limited to the issue or descendants of the grantors, who might be living at the death of the survivor of them, as no other persons could answer the description of heirs of both of them, and that such was the intention of the grantors is manifest from the explanatory words used in the deed, "that is to their children, grandchildren or such other persons as by the laws of the State of New York would be heir or heirs of the said Matthew and Martha Codd at the time of the death of the survivor of them, if this deed had not been made." The lands granted belonged to both grantors.

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The estate of these heirs was not a mere equitable interest in remainder, which could be made available only through the trustees, or was dependent upon their estate and would fall with it, but, when the limitation took effect by the happening of the prescribed event, the plaintiff became seized of a legal estate in fee, as purchaser from her parents. The grant to the trustees and their heirs being to hold to the use of the remaindermen after the death of Matthew and Martha Codd, no estate vested in the trustees, but the legal estate vested directly in the *cestui que use* whenever the event occurred. This was the law under the statute of uses before the Revised Statutes, and is clearly so under them. The provisions in this respect are expressly made applicable to estates previously created. (1 R. S., 727, §§ 47, 48.) The remainder is the same in effect, as if limited directly to the issue of the grantors living at the time of the death of the survivor of them.

In substance therefore the trust deed created, first, a trust or power (the deed says "full power and authority") to sell enough of the land to pay the debts of the grantors existing at the date of the deed. This trust or power was to be executed immediately, and during the lives of the grantors, for second, the residue remaining after these sales, is to be held in trust to receive the rents and pay them to the grantors and the survivor of them, for the support of themselves and their children, during the lives of the grantors and the life of the survivor. There is nothing in the deed continuing any trust beyond the lives of the grantors. On the contrary it is expressly provided that the lands not sold as aforesaid shall be held for the use of such persons as would be the heirs of the grantors at the time of the decease of the survivor of them, if the deed had not been made. It was the evident intent, though the language is peculiar, that the estate of the trustees should then cease, and the title vest in these heirs as it would have done if the deed had not been made. No power of sale was to exist after the death of the grantors. In this respect the case differs materially from *Collier v. Wal-*

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ters, (L. R., 17 Eq., 252). There the trust was not, as in this case, to sell part of the land to pay debts, and hold the residue to the use of the remainderman after the death of the beneficiary for life, but to hold the whole property in trust until certain debts and legacies should be fully paid, and to pay them, not by sales of part, but with the net income of the whole, and the trust was, by its terms, to continue even after the death of the beneficiary, if the debts had not then been paid out of the income. The remainder limited on the death of the first named beneficiary and the payment of debts and legacies, was not therefore a legal remainder to take effect on the death of the first named beneficiary.

But in the present case there was no trust even to sell all the lands, but only enough to satisfy the then existing debts. The trust to sell did not apply to the residue, the income of which was to be paid to the grantors. Practically some time would be occupied in ascertaining the debts and selling enough land to pay them, but when this was done it would relate to the time when it should have been done. By the terms of the deed it was to be done immediately, and the rest of the land freed, and on the principle upon which *Manice v. Manice* (43 N. Y., 303) was decided, the separation between the land to be sold and the residue to be held in trust, whenever practically carried out, took place in contemplation of law immediately after the delivery of the deed. The residue only passed to the trustees for the benefit of the grantors.

Second. The estate of the trustees was commensurate with the purposes of the trust, no more, no less, and consequently ceased when those purposes ceased. This was the rule at common law as well as under the Revised Statutes. The insertion of words of inheritance in the deed, or their omission, could not control this principle.

Third. Whatever view may be taken of the trust to sell for the payment of debts, and even if it should be held to apply to all the land, which I am clearly of opinion it did not, it was not by its terms to continue beyond the two lives,

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and there can be no doubt that it had actually terminated long before the death of Mrs. Codd, the survivor of the grantors. More than sixty years had then elapsed since the creation of the trust, and the authority was to sell for the payment of debts then existing. The power was to be executed immediately, and its execution could have been compelled. The legal presumption of payment is applicable to all those debts.

If any lands were required to be sold for their payment, the presumption is that the sale was made at the time it should have been. There is no pretence that any of the lands now claimed by the plaintiff were so sold or that the defendants claim title under any such sale. On the contrary they claim wholly by reason of an alleged adverse possession, founded upon a void tax sale, and a mortgage executed by one of the *cestuis que trustent*.

The trust terminated therefore by its own limitation on the death of Martha Codd in 1871, and the plaintiff thereupon became seized of a legal estate in fee.

Fourth. The statute of limitations did not begin to run against her until that time. So long as there was an outstanding precedent estate in the trustees, and until the right of the plaintiff to enter accrued, the statute did not run against her. The adverse possession began in 1839, and long before the death of Mrs. Codd the statute had run against the trustees. It may be conceded for the purposes of this case that the equitable interests of the beneficiaries under the trust had been barred. But the legal estate in remainder, limited to take effect after the execution of the trust, was not dependent upon the estate of the trustees, nor derived through them, but came to the plaintiff directly from her parents, and no act or laches of the trustees could bar her right to enter as soon as her right of entry accrued. The statute then, and then only, began to run against her.

Fifth. The previous destruction of the estate of the trustees by disseizin or adverse possession, did not defeat the remainder, even if it was contingent. The provisions of the

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Revised Statutes apply to the case. They declare that no expectant estate can be barred by any act of the owner of the precedent estate, or any destruction of such precedent estate by disseizin, etc., or otherwise, and that no valid remainder shall be defeated by the determination of the precedent estate before the happening of the contingency upon which the remainder is limited to take effect, but should the contingency afterwards happen the remainder shall take effect in the same manner as if the precedent estate had continued to the same period. (1 R. S., 725, §§ 32, 34.)

The disseizin or adverse possession in this case did not take place until after the Revised Statutes went into operation. The adverse possession did not begin until 1839, and the effect of the destruction of the precedent estate, upon the remainder limited thereon, is determined by the statute then in force. There is nothing in the Revised Statutes which restricts the operation of these provisions to remainders or expectant estates subsequently created. The only saving clause is that none of the provisions of chapter one shall impair vested estates or interests, except in the case of passive trusts, nor affect the construction of any instrument which had previously taken effect. (1 R. S., 750, § 11.) The sections 32 and 34 above cited do neither. They simply determine the effect which the destruction of a particular estate, occurring after their passage, shall have upon a contingent remainder limited thereon. No rights had become vested in consequence of such destruction, for it had not happened. No retroactive effect is sought to be given to the statute. Neither do these sections affect the construction of the deed.

Sixth. Even if it be held as claimed, that in addition to the remainder, the plaintiff had an equitable interest in the premises under the trust for the support of the grantors and their children, which she could have enforced during the life of her parents, the only effect of her omission to assert that right before the estate of the trustees was barred by adverse possession, was to bar her equitable right as *cestui que trust* to a support out of the income. By thus waiving or losing such

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equitable right during the trust, she did not bar her right to claim the legal estate in remainder when the event occurred which entitled her to enter as owner.

I consider these propositions fully sustained by the authorities cited in the briefs of counsel and others which I have examined, but I forbear comment upon them, or an extended discussion, as I merely wish to state the grounds of my dissent.

I am of opinion that the decision at General Term was right and should be affirmed.

All concur with DANFORTH, J., for reversal, except RAPALLO, J., dissenting, and EARL, J., taking no part.

Order reversed and judgment affirmed.

AMELIA KERR, Executrix, etc., et al., Appellants, v. EDWARD H. DOUGHERTY, Trustee, etc., et al., ALMIRA E. HOLAHAN, Respondent.

A corporation chartered by special act may, by appropriate language, be made subject to the provisions of the general act of 1848 (chap. 319, Laws of 1848, amended by chap. 51, Laws of 1870), providing for the incorporation of benevolent and other societies, which restricts the capacity of such corporations to take under a will.

The provision of the act of 1870 (chap. 129, Laws of 1870), amending the act of 1839 (chap. 99, Laws of 1839), incorporating the Union Theological Seminary of the city of New York, which limits the power of that corporation to take and hold by gift, grant or devise, by subjecting it "to all the provisions of law relating to devises and bequests by last will and testament," make applicable to said corporation the provision of said act of 1848 (§ 6), which declares that no devise or bequest to any corporation formed under it, by one leaving wife, child or parent, "shall be valid in any will which shall not have been made and executed at least two months before the death of the testator." (RAPALLO and EARL, JJ., dissenting.)

The said provision of the amended charter also includes the provisions of the act of 1860 (chap. 360, Laws of 1860), "relating to wills," prohibiting devises or bequests to certain societies to more than one-half of the testator's estate.

79	327
113	127

79	327
124	530

79	327
126	244

79	327
126	142

79	327
158	254

79	327
78 AD	228

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The said act of 1860 is not inconsistent with said two months clause in the act of 1848, and does not repeal it.

The effect of the amendment of said charter, in the particular above mentioned, was not destroyed by the amendment of 1870 (chap. 51, Laws of 1870), to said act of 1848.

Accordingly *held* (RAPALLO and EARL, JJ., dissenting), that a bequest to said corporation in the will of a man who died within a month after the execution thereof, leaving a wife surviving, was void.

Also *held* (RAPALLO and EARL, JJ., dissenting), that a bequest to the New York City Mission and Tract Society was void because of a similar provision of its charter (chap. 63, Laws of 1866).

The provision of the act of the Legislature of Pennsylvania of 1853, relating to corporations, etc., which prohibits devises or bequests to any body politic, or person in trust, for religious or charitable uses, unless by will executed at least one month before the death of the testator, relates to and affects the power to take as well as the power to devise (RAPALLO and EARL, JJ., dissenting).

A religious corporation, therefore, of the said State cannot take a bequest to it in trust for such purposes contained in a will executed in this State by a citizen thereof within one month of his death; and such a bequest is void (RAPALLO and EARL, JJ., dissenting).

Chamberlin v. Chamberlin (43 N. Y., 424), distinguished.

The right of a corporation to take by devise or bequest is subject to the general laws of the State in regard thereto, passed subsequent to its incorporation.

The will of K., which contained various legacies, some held void as above, gave to his wife the net income derived from his estate, after payment of the legacies, during her life, and the principal left of the estate after her death to various societies. *Held* (RAPALLO and EARL, JJ., dissenting), that the sums attempted to be bequeathed by the void legacies were undisposed of by the will, and were to be distributed as in case of intestacy.

The general rule that in a will of personal property a general residuary clause carries whatever is not otherwise legally disposed of, does not apply to a residuary clause limited by its terms to what remains after payment of specific legacies; in such case if any of the legacies are void there is another residuum which is undisposed of.

In the interpretation of a residuary clause in a will the court will look not only at the language employed but the surrounding circumstances to determine what the intention of the testator was.

(Argued May 28, 1879; decided January 13, 1880.)

THESE are appeals by the plaintiffs and various of the defendants from a judgment of the General Term of the Supreme Court, in the first judicial department, which modified and affirmed as modified a judgment, entered upon a

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decision of the court on trial at Special Term. (Mem. of decision below, 17 Hun, 341.)

This action was brought by plaintiffs as executors of the will of Henry A. Kerr, deceased, to obtain a construction of said will. The will was executed December 8, 1876; the testator died December 31, 1876; he was at the time of the execution of the will a resident of the city of New York, where he died.

The will is as follows :

"I, Henry A Kerr, considering the uncertainty of this mortal life, and being of sound mind and memory, do hereby make, publish and declare this instrument to be my last will and testament.

"I.—My will is that all my just debts and personal expenses shall be paid out of my estate by my executrix and executor herein named, as soon as practicable after my decease.

"The legacies are to be paid as soon as the amounts can be collected out of funds now invested on bond and mortgage at the city of Grand Rapids, Michigan.

"II.—I give and bequeath unto Edward H. Dougherty, son of William C. Dougherty, deceased, the sum of \$10,000 in trust, for the sole use and benefit of his two daughters, Amelia Kerr and Edda H. Dougherty, to be given to them at such times and in such sums as he shall think proper, share and share alike. If either of them die before receiving her share, then the balance is to be given to the survivor.

"III.—I give and bequeath unto Mrs. Almira E. Holahan, \$1,000, which some is to be credited to her on the book now kept by me of the house No 146 West Fourth street, and deducted from the amount there charged.

"IV.—I give and bequeath unto Maria Dunkin, the daughter of Thomas J. and Elizabeth Dunkin, \$1,000.

"V.—I give and bequeath to the directors of the Union Theological Seminary of the city of New York, the sum of \$10,000 to be invested as a permanent fund in stocks or bonds of the United States or of the State of New York,

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the interest of which shall be given as support to such student or students of the said seminary studying with a view to the Christian ministry as shall be selected for the gift by the directors.

“ VI. — I give and bequeath to the Presbyterian Board of Foreign Missions the sum of \$5,000.

“ VII. — I give and bequeath unto the Presbyterian Board of Home Missions the sum of \$5,000.

“ VIII. — I give and bequeath unto the New York City Bible Society the sum of \$1,000.

“ IX. — I give and bequeath unto the New York City Mission and Tract Society the sum of \$1,000.

“ X. — I give and bequeath unto the Trustees of the General Assembly of the Presbyterian Church of the United States of America, for the use of the fund of disabled ministers, the sum of \$5,000.

“ XI. — I give and bequeath unto the Board of Trustees of the Scotch Presbyterian Church of which I am a member, the sum of \$1,000 for church purposes.

“ XII. — I give and bequeath unto the sabbath schools of the above named church, the sum of \$1,000 to be divided as the pastor shall direct.

“ XIII. — I give and bequeath unto the Presbyterian Hospital the sum of \$1,000, for which aid and care is to be given to any of the members of the Scotch Presbyterian Church, who may require aid in sickness.

“ XIV. — I give and bequeath unto my pastor, the Rev. Samuel M. Hamilton, the sum of \$1,000.

“ XV. — I give and bequeath unto my beloved wife, Amelia Kerr, all the net income that may be derived from my estate after my decease, and after the legacies are paid off, she is to receive the same during her life-time. Also, I give her all the furniture, useful and ornamental, in the building No. 10 East Ninth street, also in the building No. 146 West Fourth street, which I now own, also all personal jewelry and clothing which I now own or may own at the time of my death.

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“XVI.—I hereby appoint Amelia Kerr, my wife, and Walter Carter, present elder in the Scotch Presbyterian Church, as my executrix and executor.

“I hereby give them full power and authority to grant, alien, sell, and convey any and all lands and leasehold estates owned by me, or to which I shall be entitled, or in which I shall have any interest at the time of my death, and to execute, acknowledge, and deliver good and sufficient conveyances thereof, and apply the proceeds of such sales in conformity to the provisions of this my last will and testament.

“XVII.—I do further hereby will and declare that the bequests herein made to my said wife, Amelia Kerr, are in lieu of all dower, or claim of dower, in or to my estate.

“And I do hereby revoke all former or other wills and testaments at any time heretofore by me made, and I do hereby declare this instrument to be my last will and testament.

“XVIII.—I give and bequeath all the principal left of my estate, after the death of my wife, Amelia Kerr, to the societies, seminary, or institutions named in the fifth, sixth, seventh, ninth and tenth articles, or bequests to be divided according to the several amounts so bequeathed *pro rata*.

“In witness whereof, I have hereunto subscribed my name and affixed my seal this 8th day of December, 1876.

[L. S.]

“HENRY A. KERR.”

The Special Term held that the legacies contained in the fifth, seventh, eighth, ninth, tenth, twelfth and thirteenth clauses of the will were void, and that the sums, so bequeathed, belonged, as estate undisposed of, to the widow and next of kin. That the eighteenth clause was valid as a bequest to the legatee named in the sixth clause, and gave to said legatee five twenty-sixths of the principal left after the death of the testator's widow, but in all other respects that said clause was void.

The modification by the General Term was simply as to the time from which the legacies drew interest, it holding

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that interest was chargeable only after a year from the death of the testator.

Further facts appear in the opinion.

George De Forrest Lord, for executors, appellants. Unless a contrary intention is actually expressed in or can be clearly inferred from the will, all property or interests not covered by other valid and efficient dispositions, fall into and are covered by the residuary clause, so far as such residuary clause is itself valid and efficient. (2 Redf. on Wills, 115; *King v. Strong*, 9 Paige, 94.) Whatever intention the testator had as to the source from which the legacies were to be paid must be found in the words, "out of funds invested in bond and mortgage," etc. (1 Redf. on Wills, 432 [m. p.].) The testator's intention is to be ascertained from the whole will, and the general scope and scheme of it. (2 Story's Eq. Jur. [12th ed.], § 1074 b, e; 1 Redf. on Wills, 428, 433, 434 [m. p.].) The court below should have confined itself to a simple declaration of the rights of the parties, and the principles on which the accounts were to be adjusted. (2 R. S. [Edmonds' ed.], 96, § 61; id., 97, § 65.)

E. W. Paige, for Union Theological Seminary, appellant. Section 6 of chapter 319 of Laws of 1848 does not apply to this appellant; it is only applicable to corporations organized under that act. (*Lefevre v. Lefevre*, 59 N. Y., 434, 447, 448.) This appellant was not a "religious" society within the meaning of that adjective as ordinarily used in the statutes. (*Theo. Sem. of Auburn v. Kellogg*, 16 N. Y., 83, 89.) Chapter 51, Laws of 1870, amending the act of 1848 (chap. 319), as to this appellant repealed the two months clause in section six of the act of 1848. (*Excelsior Pet. Co. v. Lacey*, 63 N. Y., 422-426; *Dexter and Limerick Pk. Rd. Co. v. Allen*, 16 Barb., 15-18; *Davis v. Fairbanks*, 3 How. [U. S.], 636; 6 Wels. & Skin. Laws N. Y., p. 24, chap. 85.) If the act of 1870 has the effect which is claimed for it, it is a "*mort main* act," and must be strictly

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construed. (*Downing v. Marshall*, 23 N. Y., 366, 379; *Myers v. Perigal*, 2 D., M. & G., 600, 619; *Flood's Case*, Hob., 136; *Att. Gen. v. Rye*, 2 Vern., 453; *Att. Gen. v. Burdett*, id., 755; 3 Chy. Rep., 154.) The act of 1848 being restricted by its terms to the corporations which are formed thereunder, it is restricted in its operation to them alone, and its provisions affect no corporations but those formed under it, or those which the Legislature by unmistakable words of reference has brought within its scope. (Potter's Dwarries, 219; *Sullen v. Badcock*, 6 S. B., 796.)

M. M. Budlong, for New York Bible Society, appellant. The act of 1860 repeals the two months clause of section six of the general act of 1848, and applies to corporations like this appellant, the New York Bible Society, formed under the general act. (*Lefevre v. Lefevre*, 59 N. Y., 446, 448, 449; *Bartlett v. King*, 12 Mass., 537; *Nichols v. Squire*, 5 Pick., 168; *Duviess v. Farebairne*, 3 How. [U. S.], 636; *Pierce v. Delmater*, 1 Comst., 17; Potter's Dwarries on Stat., 154; 2 N. Y. Sup. Ct. Rep., p. 340.)

Walter Edwards, jr., for New York City Mission and Tract Society and others, appellants. The words quoted from the charter of this defendant, viz.: "subject to any provisions of law in relation to devises and bequests by will," do not refer to, or include, or serve to incorporate into said charter section six of the law of 1848. (3 Edmonds' Statutes, p. 705; *Lefevre v. Lefevre*, 59 N. Y., 434.) As the gift of more than one-half of the testator's estate was postponed until after the death of his wife, and there would then be none of the relatives mentioned in the act of 1860 (chap. 360), it was not applicable to this case. (*Chamberlain v. Chamberlain*, 43 N. Y., 440; *Harris v. Am. Bible Soc.*, 4 Abb. [N. S.], 421.) The court below erred in holding that the legacies which were declared to be void were to be regarded as estate undisposed of, and so paid to the next of kin. (43 N. Y., 427, 447.)

B. F. Watson, for respondent. The will having been made within two months of the testator's death the legacies to the appellants were void under section 6 of chapter 319, Laws of 1848. (3 Stat. at Large, 705.) The general laws as to charitable corporations, so far as not inconsistent with the charters of the appellants are to be taken as a part of them, and read as though engrafted into and upon them. (*Lefevre v. Lefevre*, 59 N. Y., 434.) If the legacies to the appellants should be held valid, they could only be so held to the extent in the aggregate of one-half the testator's estate. (*Chamberlain v. Chamberlain*, 43 N. Y., 424.) To entitle a residuary legatee of personality to the benefit of a lapsed or void bequest, he must be a legatee of the residue generally, and not partially so. Where it is clear from express words that a gift of the residue is confined to the residue of a particular fund or description of property, or to some certain residuum, he will be restricted to what is thus particularly given. (2 Rop. on Leg., 457; 2 Jac. & M., 404; 2 P. Wms., 40; Amb., 577; Turn. & Russ., 260; 1 Hill's Chy., 195; Chy. Ct., 138; *King v. Woodhull*, 3 Edw., 79; *Chamberlain v. Chamberlain*, 43 N. Y., 424; Redfield on Wills, vol. 2, p. 119; *Skrynesber v. Northcote*, 1 Swans., 570.) When a residuum of personal estate is disposed of by a will in two parts, and the first disposition is invalid, the same does not go to the legatee of the other part, but goes to the next of kin. (*Beekman v. Bonsor*, 23 N. Y., 298; *Betts v. Betts*, Sup. Ct. Special Term; *Downing v. Marshall*, 23 N. Y., 382; *White v. Howard*, 46 id., 144.) As to the matter of accounting by executors, the jurisdiction of this court and of the surrogate is entirely concurrent. (Redfield on Surrogates, pp. 355-356.)

MILLER, J. Numerous questions arise upon this appeal in regard to the construction of the will of the testator. Most of them are sufficiently considered in the elaborate opinion of the judge at Special Term, and the discussion

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here will be confined to such of them as are deemed material for a proper disposition of the case.

The legacy to the directors of the Union Theological Seminary, of the city of New York, of the sum of \$10,000, devised by the fifth clause of the will, is claimed to be void on several grounds, and mainly for the reason that it is in conflict with the provisions of section 6 of chapter 319 of the Laws of 1848. There is no force in any of the objections urged, unless it may be in the one last stated, and that will be duly considered. The act in question is entitled, "An act for the incorporation of benevolent, charitable, scientific and missionary societies;" and the first section of the act authorizes the incorporation of these societies, for the purposes named, with the addition of societies for literary, mission or other Sabbath school purposes. The sixth section cited is as follows: "Any corporation formed under this act shall be capable of taking, holding and receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of \$10,000, provided no person leaving a wife, child or parent shall devise or bequeath to such institution or corporation more than one-fourth of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator." The question is whether this section applies to the Union Theological Seminary and controls the devise in question; and to determine this question it is important to consider the act incorporating the seminary and those laws amending said act, as well as other provisions of law relating to the subject.

The act to incorporate the Union Theological Seminary (chap. 99, S. L. of 1839), authorizes the taking and holding by gift, grant and devise, or otherwise, and the purchasing and conveying of property as therein provided. The act to

amend the same (chap. 636, S. L. of 1865, § 1), declares, that it shall be lawful for said seminary, "subject to existing laws to take and hold" property, as provided. And the act to further amend the act of 1839 (chap. 129, Laws of 1870), limits the power to take and hold "by gift, grant or devise or otherwise, subject to all the provisions of law relating to devises and bequests by last will and testament." In the comprehensive words employed in the language quoted, the Legislature no doubt intended to embrace "all the provisions of law" of a general character relating to the subject, which would, we think, include those contained in the act of 1848. This would also include the provisions of the "act relating to wills" (chap. 360 of the Laws of 1860), which prohibits any devise or bequest to any benevolent, charitable, literary, scientific, religious or missionary society, by a person having a husband, wife, child or parent, of more than one-half part of his or her estate, and provides that such devise or bequest shall be valid to the extent of one-half and no more; and the provisions of the act to amend the act of 1848 (chap. 51 of the Laws of 1870), which, among other things, "authorizes the incorporation of any society for the purpose of establishing and maintaining any educational institution" and confers power upon any university or college incorporated under the act of 1848 and the amendatory act, to take and hold property.

The act of 1860 is not, I think, inconsistent with the two months clause which constitutes a part of section six of the act of 1848, but is in harmony with it and does not repeal the clause in question: (*Le Fevre v. Le Ferre*, 59 N. Y., 449.) These are the only general provisions of law relating to the subject, and the inquiry may well be made to what did the act of 1870, amending the defendant's charter refer, unless it was to the law of 1848 and the law of 1860 above cited? That these provisions are general in their character appears to be conceded by the opinions in *Le Fevre v. Le Fevre* (*supra*). In the case cited it was held that the Female Guardian Society was subjected by section six of

the act of 1848 to the operation of the two months clause, and that the bequest was void. It was also held that the provision referred to was not repealed, by express terms or otherwise, by the act of 1860, and that it might be read as if a part of section six, without any want of harmony with the inhibition of making a will within two months before death. It is contended that section six is by its terms confined to corporations organized under that act; that it is not a law relating to wills, and therefore can have no application. The answer to this position is that in the case last cited this court held that a corporation chartered by special act might be made subject, by appropriate language, to the provisions of the general act of 1848 restricting its capacity to take. It is true in the case cited the provision in the charter was "subject to the same provisions as provided in the general laws for the incorporation of religious and benevolent societies;" but this language is not any more comprehensive than that contained in defendant's charter, as we have seen. Looking at the intention of the Legislature, it is to be presumed that the same intention existed in chartering the defendant's corporation as did in reference to the Female Guardian Society, and any inference to the contrary would leave the limitation without any meaning, as by its terms it could not apply to any other laws.

It is further contended that the act of 1848 is not a provision of law relating to wills. The answer to this position is that this is not required by the defendant's charter. The language employed relates to devises and bequests by last will and testament, and hence the bequest is brought directly within the words of the act of 1848. It may be added that as devises and bequests pertain to wills, it is not apparent why the provision in question does not relate to them. The provision of law referred to expressly meets the terms employed in the charter. The argument that the judgment can be upheld only by construing the statute of 1848 and 1860 to mean something which is not expressed, is not, we think, well founded. The designation of the vari-

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ous institutions named in the act should receive a liberal interpretation, and not be restrained by any technical rule. It is conceded that the defendant's institution is a "seminary" for the instruction of students in "theology." What is this but a "literary" institution, within the very language of the law. It certainly relates to letters and to literature. It is also "benevolent," for it was incorporated to impart religious instruction, without any purpose of gain. For the same reason it comes within the definition of "charitable," as charitable uses embrace gifts for general public uses, and may include both the rich and the poor: (Bouvier, title Charitable Uses.) Properly speaking, then, the defendant comes palpably within the strict and literal meaning of the terms employed in the act of 1848. We do not deem this material, however, for it is quite sufficient if the defendant is included within the general purposes of the act which relates to devises and bequests by will. And when the Legislature provided in the defendant's charter that the power to take by devise should be controlled by "all provisions of law" relating to that subject, it included the provision cited from the act of 1848, without regard to its title, or any particular institutions therein named, even although such provision was originally intended to be restricted in its operation to corporations formed under that act. There can, we think, be no doubt as to the power of the Legislature to pass a law applying a prior enactment relating to particular institutions therein named, by implication or by reference, as well as by an exact recital of the language employed, to other institutions not named by a subsequent act.

It is also claimed that as the act of 1870, amending the act of 1848 and authorizing the incorporation of any society for the purpose of establishing and maintaining any educational institution, and also provides for the taking and holding, by gift, grant, devise or bequest, of any university or college incorporated under said act, subject to the restrictions contained in the act of 1860, it excludes all other restrictions,

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and repeals the two months clause in section six of the act of 1848. If the defendant is a benevolent, literary or charitable institution, then of course the latter act can make no difference. To hold that the defendant came within the provision cited and no other, would entirely exclude the amendment to its charter passed in 1870, which, as we have seen, includes "all provisions of law," while the amendment applies the act of 1848 to a "university or college," which is not the designation by which the defendant was chartered or is generally known. It may also be remarked that the amendment to the defendant's charter was passed subsequent to the amendments of the act of 1848, and hence, as the last enactment would include every provision of law, it is not restricted to the act of 1860. It should also be noticed that it is at least questionable whether the restriction in the act of 1870 is not qualified by the defendant's charter, and should not be regarded as only an additional one besides those already imposed, without in any way impairing the effect of such charter. There is nothing, we think, in the point urged that if the act of 1870, amending the defendant's charter, has the effect claimed, it is a mortmain act. Nor is it essential, we think, that the two months clause, and all the other restrictions contained in section six, should be held to apply to a devise or bequest, in order to enforce such clause. The various acts of the Legislature which have been cited would seem to indicate a general policy of the State in reference to restricting devises and bequests made to corporations of a particular class; but aside from such a consideration, it is sufficient that a fair interpretation of the provisions cited leads to the conclusion that this defendant was not entitled to the bequest made to it by the will of the testator.

There is, we think, no analogy between this defendant's charter and the charter of the Board of Foreign Missions, for the latter restricts the power to take, subject to the provisions of the act of 1860, while the former covers all provisions of the law on the subject. Some other questions are made

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in reference to the point considered, but none of them, we think, demand especial attention.

The validity of the bequests to the New York City Mission and Tract Society incorporated by the act chapter 63, Laws of 1866, depends upon restrictions contained in its act of incorporation of a similar character to those incorporated in the charter of the Union Theological Seminary, and the bequest must fail for the reason stated in reference to the latter institution.

No appeal is taken from the decision in reference to the bequests to the Board of Home Missions and the Presbyterian Hospital, and hence no question is presented as to these institutions.

The validity of the bequest to the Trustees of the General Assembly of the Presbyterian Church in the United States of America, for the use of the fund of disabled ministers, depends upon the question whether the laws of the State of Pennsylvania, which declare the manner in which devises or gifts of this kind shall be made, are applicable and control the bequest in question. The eleventh section of the act of 1855, of that State, relating to this subject declares that : "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same, be done by deed or will, attested by two credible, and at the same time, disinterested witnesses, *at least one calendar month before the decease of the testator or alienor*, and all dispositions of property contrary hereto, shall be void, and go to the residuary legatee or devisee, next of kin or heirs, according to law, provided that any dispositions of property within said period, *bona fide*, made for a fair, valuable consideration, shall not be hereby avoided." Section fifteen provides that : "All dispositions of property hereafter made to religious, charitable, literary, or scientific uses, and all incorporations or associations formed for such objects, shall be taken to have been made and formed under, and in subordination to all the duties and requirements of this act, as rules of property and laws for their government."

Two corporations claim that they were intended to be designated by this bequest, who are defendants herein. Both were organized under the laws of Pennsylvania; and under the provisions cited it is very clear that if the testator had been a resident of the State of Pennsylvania, the bequest made would have been entirely nugatory, for the reason that the will was executed within one month before the decease of the testator, in violation of section eleven above cited. The question then arises whether the fact that the devisee was a non-resident makes any difference, and renders a bequest plainly in violation of the laws referred to, if made in Pennsylvania, valid and effectual.

The evident object of the laws of Pennsylvania, which have been cited, was to prevent devises or gifts for charitable and religious purposes, except in the manner expressly provided. The will or deed must not only be executed in the presence of two witnesses, but at least one calendar month prior to the death of the giver. "The limitation related both to the power to dispose of property and the right to take it by deed, bequest or devise, and it cannot be claimed, upon any valid ground, that the law was intended to be confined in its operation to the mere formal requisites essential to the valid execution of the instrument." It virtually declares that "no estate" shall pass, and that "all dispositions of property," for the purposes of the act, without regard to the domicile of the giver, shall be ineffectual, unless made in conformity with its provisions. "The policy of the law of Pennsylvania evidently was to make *all* such gifts invalid; and it would be a forced and constrained construction to hold that such policy could be avoided and set at naught, and the very intent and language of the act frustrated, because the testator resided and the will was executed outside of the territorial limits of that State." Suppose a resident of Pennsylvania should pass over the line, and make a will there in violation of this statute. Will this avoid it and set it at naught? If it would, the law of the State would be entirely subverted and rendered of no avail, and its policy in regard to such devises and bequests evaded.

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The question discussed was the subject of consideration in the case of *Chamberlin v. Chamberlin*, (43 N. Y., 424); and it was held that the law of the testator's domicile controls as to the formal requisites essential to the validity of the will, the capacity of the testator and the construction of the instrument. It was also decided that where the will was executed lawfully, the validity of the bequests will depend upon the law of the domicile of the legatee and of the government to which the fund by its terms is to be transmitted for administration and the particular purposes indicated by the testator. It was also said by ALLEN, J., after laying down the foregoing rule: "Whatever may be the law of Pennsylvania, a testator domiciled in that State cannot establish, by bequests of personalty to citizens or corporations of this State, a charity or trust to be administered here inconsistent with the policy or the laws of this State. A gift by will of a citizen of this State to a charity, or upon a trust to be administered in a sister State, which would be lawful in this State, the domicile of the donor, would not be sustained if it was not in *accordance with the laws of the State in which the fund was to be administered*. "Bequests in aid of foreign charities, valid and legal in the place of their existence, will be supported by the courts of the State in which the bequests are made: (Hill on Trustees, 457.)" The learned judge also holds that if the legatee is authorized to take the legacy, "it will be sustained, irrespective of the law of the testator's domicile, subject, however, to this qualification, that if the law of the testator's domicile in terms forbid bequests for any particular purpose, or in any other way limit the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void everywhere."

The case cited differs materially in the facts from the one at bar. The devise was to a Pennsylvania corporation, and the will was executed more than one month before the death of the testator; and hence the act of 1855 already cited had no application. The principles laid down are, however,

applicable to the case now considered, and it seems quite clear that the law of the domicile of the legatee, and of the government of the State of Pennsylvania, must prevail. If the will had been made in Pennsylvania, there would be no question that the law of that State would control. Can there be any less doubt because it was made in New York? Clearly not; for the rule is the same, without regard to the fact that the will was executed out of the State of Pennsylvania. The remarks which we have cited from the opinion expressly uphold this rule, and are directly in point. The position taken by the counsel for some of the defendants, that the case cited would sustain and not defeat the legacy, is not, we think, upheld.

The terms of the bequest in the case cited, which was particularly involved, are not material to the decision of the case at bar, as the whole question here turns upon the effect of the execution of the will within the *thirty* days provided for by the act of 1855. While the legacy in the case cited was properly sustained, it by no means follows that it should be upheld in the case at bar. The question is not as to the construction of the terms of the devise, but as to the right to make it at all, in contravention of the statute of Pennsylvania. To maintain that the statute of Pennsylvania has no force in New York, would render the statute ineffective and of no avail in many cases, in violation of the express prohibition which constitutes its very essence. Although the question considered did not distinctly arise in the case cited, yet the principle involved authorized its consideration, and we think it is decisive on the subject in the case at bar.

It is also insisted that the defendant the "trustees of the general assembly," etc., having been chartered by special act before the passage of the act of 1855, its power to take and hold real and personal estate given by its charter cannot be taken away, restricted or limited by a subsequent act, and its power in this respect is not subject to the act of 1855. A complete answer to this position is that the defendant derived no more right to take and hold property than was

possessed by individuals, which is always subject to the general laws of the State existing or laws to be thereafter passed in regard to the acquisition and disposition of property. It follows that the bequest, being in contravention of the act of 1855, was void in Pennsylvania, where the legatee has a domicile, and consequently void in New York, where the testator resided.

As the conclusion arrived at disposes of the subject, we do not deem it necessary to consider whether the bequest in question would have been invalid under the act of 1848. Nor is it important, under the views which we have taken, to determine which of the two corporations claiming the legacy would have been entitled thereto if it had been valid.

In regard to the bequest to the New York City Bible Society, we concur with the opinion of the General Term, that the statute of 1860 did not affect or restrict the operation of the two months clause contained in section six of the act of 1848: (*Le Fevre v. Le Fevre*, 59 N. Y., 434.)

It is claimed that the case last cited does not decide the question and is not a binding authority. It is true that in the case cited the legatee was not incorporated under the general law of 1848, but by a special charter. We think this does not aid the position taken by the counsel for the Bible society; for if section six was applicable to a society with a special charter, there is far stronger reason for holding that it applies to a corporation organized under the general act. It may be added that the question was fully considered in the case cited; and as the reasoning in the opinion is sound, the *decision* should be followed.

We think that there was no error of the judge upon the trial in the conclusion arrived at, that the sums bequeathed by the void legacies, contained in the fifth, seventh, eighth, ninth, tenth, twelfth and thirteenth articles of the will, and amounting to the sum of \$24,000, belong, as estate undisposed of, to the widow and next of kin of the testator, and that the same should be distributed as intestate property. If the legacies referred to are void, then, if no other

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provision is made, the disposition must follow the statute of distribution.

It is claimed that the eighteenth article of the will is a residuary clause which declares the disposition to be made of some of these void legacies. By this provision the testator gives and bequeaths "all the principal left of my estate, after the death of my wife, Amelia Kerr, to the societies, seminaries or institutions, named in the fifth, sixth, seventh, ninth and tenth articles or bequests, to be divided according to the several amounts so bequeathed *pro rata*."

It will be seen that this relates to a disposition after the death of the wife of the testator, and not before, and hence the amount of the void legacies in the meantime must remain undisposed of, unless some other provision is made. And even after her death, if these legacies were valid, the bequests would be subject to the act of 1860, and the same would be valid only to the extent of one-half of the estate bequeathed, leaving the other half undisposed of to be distributed among the next of kin of the deceased. This provision only takes effect after the death of the testator's wife, and hence leaves no express direction as to the disposition of any of the legacies which may be declared to be void. It, therefore, can scarcely be regarded as a residuary clause, in the usual acceptance of that term. According to the position assumed by the plaintiffs, the sums so bequeathed by the void legacies would increase the amount of the widow's portion, and would be subject to her life estate in the income thereof, and not be payable until after her death. The fifteenth clause, which provides for the widow, bequeaths "all the net income that may be derived from my estate, after my decease and after the legacies are paid off," during her life. It was evidently intended by the testator to dispose of a portion of his estate to pay legacies, and then that the widow should take the remainder. The estate was by his will divided into two parts. The first was the legacies, and the second the provision for his wife. The amount of the former was fixed and definite, and the testator knew exactly what it would be.

This he meant should be first deducted, and then the balance given to his wife.

The general rule is that in a will of personal property the general residuary clause carries whatever is not otherwise legally disposed of. But this rule does not apply where the bequest is of a *residue of a residue* and the first disposition fails. This was held in *Beekman v. Bonsor* (23 N. Y., 298, 312); and it was there laid down, quoting from the master of the rolls in *Skrymsher v. Northcote* (1 Swanst., 570): "It seems clear on the authorities that a part of the residue of which the disposition fails will not accrue in augmentation of the remaining parts as a *residue of a residue*; but, instead of resuming the nature of residue, devolves as undisposed of." (See also, *Downing v. Marshall*, 23 N. Y., 382; *White v. Howard*, 46 id., 144.) In the case at bar the widow took the residue after the payment of the legacies. As some of them are void, another residuum remains; and this she was not entitled to within the rule laid down; and as the estate was disposed of in two parts, and the first was invalid, the second does not pass to the legatee, but goes to the next of kin. The general rule referred to, that the residuary bequest carries everything with it, is subject to some qualifications, as we have seen; and it is laid down in *King v. Woodhull* (3 Edw. Ch., 79, 82), as follows: "That to entitle a residuary legatee to the benefit of a lapsed or void bequest, he must be a legatee of the residue *generally*, and not *partially so*; for, where it is manifest, from the express words of the will, that a gift of the residue is confined to the *residue of a particular fund* or description of property, or to some certain *residuum*, he will be restricted to what is thus particularly given, since a legatee cannot take more than is fairly within the scope of the gift." It is also said in substance that to exclude what would fall by lapse or invalid disposition, as it may be supposed that the testator did not intend to die intestate as to any portion of his property, the law requires that he should use words limiting the gift of residue and showing an inten-

tion to exclude such portions of his estate as may fail to pass.

In the case considered, it is very apparent that the testator's wife was not a residuary legatee of all the fund, but only partially so, as the devise to her was confined to a fund after a certain amount had been deducted; and it appears by the language of the bequest most manifestly that he did not intend to include any portion of these legacies in the provision for his wife. He assumed that they were valid, and in making no provision for the failure of the legacies, as well as in the provision made for his wife, we must assume, we think, that his intention was that in such a contingency they should pass to the next of kin. The language of the two clauses of the will cited plainly indicates that such was his design. The cases are numerous which sustain the doctrine that where the language of the will giving the residue is confined to a particular fund or to a certain residuum, it will be restricted accordingly. In *Ommaney v. Butcher* (Turn. & Russ., 260), the testator, after giving a number of legacies, provided that: "In case there is any money remaining, I should wish it to be given in private charity;" and it was held that the general residue of the testator's personal estate, consisting of household estate, etc., was not comprehended in the residuary clause, which was confined to the residue and articles directed to be sold; that private charity was an object too indefinite to give the crown jurisdiction, or to enable the court to execute the trust; that the executors having equal legacies could not take beneficially; and that the next of kin were therefore entitled to the general residue, including what was comprehended in the residuary clause. In *Bland v. Lamb* (2 Jac. & W., 404), it was held that a legacy left to the testator by a relative after the making of the will did not pass under a general disposition. Lord Chancellor ELDON said: "There can be no doubt that a gift of the residue may have a limited operation; although the general doctrine of the court is, that if a person gives all the rest of his personal estate or property, such a gift will

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not only pass that which he then has, but that which may become his property." In *Att'y-Gen. v. Johnstone* (Ambler, 577), the testator, after bequeathing a number of legacies, left it with his executors to dispose of "the small remainder of my personal estate" in "charity schools in Hamburgh." The lapsed legacies amounted to £20,000; and it was held that the charity schools had no right as residuary legatees. Lord Chancellor CAMDEN said: "That he was clear the charity schools have no right under the description of residuary legatees. The rule is very true in general, that the residue takes in lapsed legacies." * * * "But the residuary legatee must be a *general* legatee, to take anything that does not pass by the will. If the testator had circumscribed and confined the residue, then the residuary legatee, instead of being a general legatee, becomes a *specific* legatee." * *

"I look upon the residuary devise to be specific, contingent and conditional; that is, 'In case my estate turns out to pay all my other legacies (which it has not) and it should be a little more, then I give that little.'" These cases establish that even in the English courts, which go very far to favor the residuary legatee, and often strain a point to hold that the residuum does pass, to avoid the consequence of its falling to the executor, that it is only where the intention is manifest, that they will sustain a bequest of this description. In *Peay v. Barber* (1 Hill Chy. [S. C. R.], 95), a bequest was made by the testator to his wife of one-half of certain personal property and to his sister's children all the rest. The wife died before the testator and the legacy lapsed. It was held that the words "all the rest and residue of my property" must be understood as exclusive of that devised; that nothing else of the lapsed legacy but property of this description passed under the residuary bequest; and that the property devised descended to heirs generally. From the cases cited it is entirely clear that in the interpretation of a residuary clause in a will, or one which it is claimed bears any analogy to it, the court will not only look at the language employed, but the surrounding circum-

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stances, to determine what the intention of the testator was. The whole theory of the will, and the plain intention of the testator, is in conflict with the doctrine contended for; and the testator having died intestate as to the portions of his estate mentioned in the eighteenth clause of his will, except as to five-twenty-sixths. the widow and next of kin are entitled to the same.

It may also be remarked that in order to make the corporations named general residuary legatees, the residue should have been given to them as a class; for a devise or bequest to several, specifying the proportion of each, is not to be regarded as made to them as a class, but is a gift of a certain portion of the residue to each of them by name. If, for any reason, any one fails, the portion thus failing will not go to increase the other portions of the residuum, as a residue of residue. (2 Redf. on Wills, 119; *Skrymsher v. Northcote*, 1 Swanst., 570.)

The other questions raised are fully covered by the opinion of the trial court and do not require examination. Concurring with the views there expressed, as modified by the decision of the General Term, we are unable to discover any ground for reversing the judgment; and the same should be affirmed, with costs in this court of all the parties appearing, to be paid out of the estate.

EARL, J. (dissenting). Differing as to the construction of this will, in some particulars, from the court below, I will confine my examination now to those particulars, leaving the construction of other portions of the will, so far as they are brought to our attention by any appeal, to rest upon the decision of that court.

1. By the fifth clause of the will the testator bequeaths "to the directors of the Union Theological Seminary of the city of New York the sum of \$10,000, to be invested as a permanent fund in stocks or bonds of the United States or of the State of New York, the interest of which shall be given as support to such student or students of the said

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seminary, studying with a view to the christian ministry, as shall be selected for the gift by the directors." This clause has been held invalid, because the will was not executed at least two months before the death of the testator; and this conclusion was reached by holding that the two months' limitation contained in section 6 of chapter 319 of the Laws of 1848, the testator having left a widow. was applicable to this corporation.

The corporation was organized by special charter by chapter 99 of the Laws of 1839, "an act to incorporate the Union Theological Seminary." By that act the corporation was made "capable in law of taking and holding by gift, grant and devise, or otherwise, and of purchasing and holding and conveying, both in law and equity, any estate, real or personal; provided that the clear annual value or income of their real estate shall not exceed the sum of \$15,000, and their personal estate shall not exceed the sum of \$50,000, exclusive of such professorships as may be from time to time endowed."

In 1848 the act above referred to, entitled "an act for the incorporation of benevolent and charitable, scientific and missionary societies," was passed. It is a general act, providing for the mode of incorporating societies for "benevolent, charitable, literary, scientific, missionary or mission or other Sabbath school purposes." Section six of the act provides as follows: "Any corporation formed under this act shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of \$10,000; provided no person leaving a wife or child or parent shall devise or bequeath to such institution or corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid in any will which shall not have been made and executed at

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least two months before the death of the testator." It will be observed that the limitations contained in that section are applicable only to corporations formed under that act.

In 1860 (chap. 360 of the laws of that year) an act entitled "an act relating to wills" was passed. It contains two sections, and is as follows: "Section one. No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, (and such devise or bequest shall be valid to the extent of one-half, and no more). Section two. All laws and parts of law inconsistent with this act are hereby repealed."

The purpose for which the Union Theological Seminary was organized is not particularly or clearly disclosed in the act of incorporation. But it may be inferred, from the title of the act and a few hints contained in the act, that the purpose was the maintenance of a seminary for the instruction of students in christian theology. It was therefore both a literary and religious society, within the meaning of the act of 1860. The limitations contained in that act reached all corporations of the character described, whether formed under the general law of 1848 or under special charters, and whether formed before or after the date of that act. It did not undertake to deal directly with corporations and place any limitations upon their powers. It simply placed restraints upon the power of every person having a husband, wife, child or parent, to devise or bequeath property to any of the corporations mentioned.

Prior to the passage of that act, the only limitations upon the power of this corporation to take by bequest were those contained in its charter, and they related solely to the amount of property it could take and hold. Provided the limited amount was not exceeded, any competent testator could bequeath all his property to it at any time before his death;

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and the same was true after the act, except that no person resident in this State and subject to its laws, who was related as mentioned in the act, could bequeath to it more than one-half of his estate.

Thus the law remained as to this corporation until 1865, when its charter was again before the Legislature, and was amended by chapter 636 of the laws of that year as follows: "It shall be lawful for the Union Theological Seminary in the city of New York, subject to existing laws, to take and hold by gift, grant or devise, or otherwise, and to purchase, hold and convey any estate, real or personal; provided that the clear annual value or income of their real estate shall not exceed the sum of \$15,000, and their personal estate shall not exceed the sum of \$100,000, exclusive," etc. Although the two months limitation contained in section 6 of the act of 1848 had been in force for many years, the Legislature did not subject this corporation to such limitation by this amendment of its charter.

In 1870, by chapter 129 of the laws of that year, the charter of this corporation was again amended, as follows: "It shall be lawful for the Union Theological Seminary, in the city of New York, to take and hold by gift, grant or devise, or otherwise, subject to all the provisions of law relating to devises and bequests by last will and testament, and to purchase, hold and convey any estate, real or personal, for the purposes of their said incorporation; provided that their personal estate shall not exceed the sum of \$200,000, exclusive," etc.

The claim is that by the language used in this last act, to wit, "subject to all the provisions of law relating to devises and bequests," this corporation became subject to the two months limitation contained in section 6 referred to. Did the Legislature, after that section had been in force for twenty-two years, and after the charter of this corporation had once in the meantime been amended, intend, by such uncertain, general language, to subject this corporation, for the first time, to the limitation then provided exclusively for

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corporations formed under that act? I think not. If such had been the intention, it is highly probable that different language would have been used to express it. The language used by a fair and natural interpretation, does not refer to the act of 1848. That was an act for the formation of certain kinds of corporations. It was not an act relating, in any proper sense, "to devises and bequests by last will and testament." It contains no general provisions. It relates only to the corporations formed under it. By the language, "the provisions of law relating to devises and bequests," was not meant such provisions found in an act confined exclusively to corporations formed under it, or such provisions on the subject of devises and bequests as could be found in many of the special charters created by the Legislature; but the language has reference to the general provisions to be found in the statutes regulating devises and bequests. Such provisions are found in the act of 1860, which was enacted solely for the regulation of devises and bequests to corporations like this. And the construction given by the court below to this language gets no support by reference to the general policy of the law and the general course of legislation. It is true that in 1848 it was the policy of the Legislature to require certain wills, which were to confer benefits upon benevolent and other corporations formed under the general act, to be executed at least two months before the death of the testator. But that limitation was not made applicable to the numerous similar corporations then existing under special charters; and although between 1848 and 1870 nearly one hundred and fifty acts were passed incorporating or extending and enlarging the corporate powers of as many corporations similar to those named in the act of 1848, the two months limitation was imposed upon but few of such corporations. Some of such corporations were made in terms subject to the act of 1848; some in terms subject to the act of 1860; some were restricted by the insertion in their charters of the two months clause; some were made subject to the general laws of the State;

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and some were made subject "to all provisions of law relating to devises and bequests by last will and testament." But the majority were incorporated with no restriction whatever as to their power to take and hold property, except as to the amount. In 1870 there were, besides the act amending the charter of this corporation, seventeen of such acts. In nine the corporations were made subject "to all provisions of law relating to devises and bequests by last will and testament;" in one the corporation was made subject to the general laws of the State; and in seven there were no restrictions whatever, except as to the amount of property they could take and hold.

It may be said that the language of the act of 1870, which we are endeavoring to construe, can have no force or effect unless it be referred to the act of 1848, as the act of 1860, and other general provisions of law as to devises and bequests, would apply to this corporation, without the use of this or other language in its charter, or any amendment thereof. This is true, but I think it has no significance. Acts are not always drafted by men learned in the law, and language is frequently used, ignorantly or from abundant caution, which is wholly unnecessary. In the law of 1865, above set out, it will be seen that the words "subject to existing laws" are used in the same way, without any meaning, as the corporation would have been subject to such laws without the use of that language. So in many of the special acts the corporations are in the same useless manner made subject to the general laws of the State, or to certain provisions of the Revised Statutes, which would apply if not referred to or mentioned. In the language now under consideration, the words "last will and testament" add nothing to the meaning, as there could be no devise or bequest without a will. It is probable, therefore, that the draughtsman of the act of 1870 did not at the time know or realize that the act of 1860 would apply to this corporation, without the reference he made in this language, and that he used the language for the purpose of applying that, and any

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other general provisions as to devises and bequests, to this corporation. Hence the language was not used without a purpose, although used unnecessarily.

I think, therefore, that it is reasonably clear that the two months' limitation contained in section six of the act of 1848 does not apply in the case of a bequest to this corporation. If the construction were doubtful, the doubt should be so solved as to uphold this bequest. The general right which this testator had, at any time before his death, to dispose of his property by will in any manner he wished, should not be taken away by language of doubtful and uncertain import and bearing. This bequest should be upheld, if it can be, without the violation of law, and effect thus given to the will of the testator, and that it can be, I think I have sufficiently shown.

2. The ninth clause of the will was also held to be invalid by the court below, for the same reason, and it is as follows: "I give and bequeath unto the New York City Mission and Tract Society the sum of \$1,000." This society was created by the act chapter 63 of the Laws of 1866. By the first section of the act, certain persons named were constituted a body corporate, and it was provided that the corporation "shall have the powers which, by the third title of the eighteenth chapter of the first part of the Revised Statutes, are declared to belong to corporations, and shall be capable of taking, by purchase or devise, holding and conveying any estate, real or personal, for the uses and purposes of said corporation, subject to any provisions of law in relation to devises and bequests by wills," the real estate not to exceed the yearly value of \$50,000.

The language, "subject to any provisions of law," etc., is claimed to subject this corporation to the two months' limitation contained in section six of the act of 1848. This language is the same as that contained in the act of 1870, which has just been considered, except that there the word "all" was used instead of "any." This slight difference in the language can make no difference in the construction.

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The word "any," as used, has no broader signification than the word "all." If the words "any provisions," etc., are to be construed so literally, and held to be so far reaching as to refer to the limitations contained in the section six, which were made applicable solely to corporations formed under the act of 1848, then they must also be held to refer to any provisions of law as to devises and bequests found in any of the numerous special charters granted to corporations since the foundation of our State government, because such provisions would literally be included in the words "any provisions." It will be seen, by an examination of the statutes, that whenever the Legislature, since 1848, has undertaken to subject corporations created by it to the two months' limitation, it has done so by express terms, or by express reference in plain language to the act of 1848.

If it be said that this language has no effect unless it refers to the act of 1848, it may be said, with equal truth, that the language used in this act as to the Revised Statutes has no effect: (*Bowen v. Lease*, 5 Hill, 221.) All this language is superfluous, and yet was doubtless used for a purpose. Therefore, without more, for all the reasons above stated, this bequest, should also be held valid.

3. The tenth clause of the will is as follows: "I give and bequeath unto the Trustees of the General Assembly of the Presbyterian Church of the United States of America, for the use of the fund of disabled ministers, the sum of \$5,000." There is a corporation organized under an act of the Legislature of Pennsylvania, passed in 1799, called "The Trustees of the General Assembly of the Presbyterian Church in the United States of America," as named in the act. The corporation is authorized to take property by devise and bequest, and I have no doubt that the purpose for which this bequest was made is one for which it is authorized to take and hold property under its charter. There is also in the same state another corporation, named "The Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers," organized in 1876, less than two

Dissenting opinion, per EARL, J.

months before the date of this will, under a general law of that State. And the purpose of that corporation is "to receive, hold and disburse such real and personal estate as may be given to it for the relief and support of disabled ministers and the needy widows and orphans of deceased ministers of the said church." There is nothing in the charters of these corporations which prevents either of them from taking, holding and administering this legacy. The court at Special Term held that this legacy was intended to be given to one or the other of these corporations, but held that it was immaterial to determine which, because, in any event the bequest was invalid. I think that the court should have determined that the legacy was intended for the corporation first named, as the name of that corresponds accurately with the name contained in the will, and there is no evidence that any other corporation was intended. It is necessary only, therefore, to determine whether that corporation can take this legacy. I think it can.

There is no claim that the two months' limitation contained in the act of 1848 applies to this Pennsylvania corporation; but the claim is that the limitation of one month contained in section eleven of an act of the Pennsylvania Legislature, entitled "An act relating to Corporations and to Estates held for Corporate, Religious and Charitable Uses," passed in 1855, applies; and so it was held by the court below. That section is as follows: "No estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, (attested by two credible, and at the time disinterested witnesses) at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs, according to law." That is a general law controlling all wills and deeds of property to corporations in that State. It does not interfere with or regulate the capacity of corporations to take, and such was not its design. It has

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no extra territorial force. It was intended solely to regulate the conduct of persons within that State. It prescribes the mode by which property may be given to corporations or in trust for religious or charitable uses in ~~that~~ State. Property may thus be given by will or deed; the instrument must be attested by two witnesses; the witnesses must be disinterested; and the instrument must be executed at least one month before the decease of the maker thereof. None of these provisions have any relation whatever to an instrument executed here by a person domiciled within this State. This will was executed here by a competent testator, in the mode prescribed by the laws of this State, and hence it is a valid will. It gives a bequest to this corporation which is authorized to take it, and hence the bequest is valid. The case of *Chamberlain v. Chamberlain* (43 N. Y., 424), is abundant authority for this conclusion. In that case, it was decided that the law of the testator's domicile controls as to the formal requisites essential to the validity of a will, the capacity of the testator, and the construction of the instrument; that when by the *lex domicilii* a will has all the formal requisites to pass title to personalty, the validity of particular bequests will depend upon the law of the domicile of the legatee, except in cases where the law of the domicile of the testator in terms forbids bequests for any particular purpose, or in any particular manner, in which latter case the bequest would be void everywhere; that the existence of corporations under the laws of sister States is recognized by the courts of this State, and they may take personal property under wills executed by citizens of this State, if by the laws of their creation they have authority to acquire property by bequest. According to these principles, the inquiry in all such cases must be first, is the bequest valid under the laws of this State, upon the assumption that the legatee can legally take the legacy; and second, is the legatee authorized to take it under the laws of the State where it is located? If these two questions can be answered in the affirmative, the bequest must be upheld.

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This bequest must therefore be held valid.

The court below held that all the sums mentioned in bequests in this will, which were held to be invalid passed as property undisposed of to the widow and next of kin of the testator ; and in this, I think, there was error.

After providing for all the legacies which he desired to give to other parties, the testator made the following provision for his wife in the fifteenth clause : “ I give and bequeath unto my beloved wife, Amelia Kerr, all the net income that may be derived from my estate after my decease, and after the legacies are paid off she is to receive the same during her life-time.” He had before provided that his debts should be paid. He then gave the legacies, and here provides in effect that what is left of his estate after the payment of his debts, legacies and the expenses of administration, shall constitute a fund the net income of which his wife shall receive during her life. And then in the last clause of the will he provides as follows : “ I give and bequeath all the principal left of my estate, after the death of my wife, Amelia Kerr, to the societies, seminary, or institutions named in the fifth, sixth, seventh, ninth and tenth articles, or bequests to be divided according to the several amounts so bequeathed *pro rata*.” This is a disposition of the precise sum of which his wife during her life is to have the income. These two clauses make a full and plain disposition of the residue of the estate, after payment of debts, expenses and legacies, the income thereof to go to the wife during life, and after her death the *corpus* or principal to go to the residuary legatees named in the last clause. A residuary bequest is one which, if valid, carries all the personal property not otherwise disposed of ; and these bequests are of that character.

Hence this is a case where the whole of the residuary estate is fully and perfectly disposed of. In such a case it is well settled that a residuary disposition as to personal estate carries not only everything not attempted to be disposed of, but everything which turns out not to have been effectually disposed of, as void and lapsed legacies. As said by a learned

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judge, "everything which is ill-given falls into the residue:" (*Reynolds v. Kortright*, 18 Beav., 417.) A presumption arises in favor of the residuary legatee against every other person except the particular legatee; and the testator is supposed to give a legacy away from the residuary legatee only for the sake of the particular legatee. Courts are always inclined against adopting any construction of wills which would result in partial intestacy, unless absolutely forced upon them. And in order to prevent a void legacy from falling into the residue, there must be some plain indication in the language of the will that the testator so intended. As said by the vice chancellor in *King v. Woodhull* (3 Edw. Ch., 79): "To exclude what may fall, by lapse or invalid disposition, from the gift of the residue, as it may be supposed that the testator did not intend to die intestate as to any portion of his property, when he set about making a will, and is supposed to exclude the residuary legatee only for the sake of the particular legatee, the law requires that he should use very special words, clearly limiting the gift of the residue, and showing in express terms an intention to exclude such portions of his estate as may fail to pass under previous clauses of the will, in order to take it out of the general rule above stated." (See also 2 Redf. on Wills, 442; Wigram on Wills [O'Hara's ed.], 73; *Attorney General v. Johnstone*, Amb., 577; *Ring v. Strong*, 9 Paige, 94; *Banks v. Phelan*, 4 Barb., 80.) Here there is no language which within any authority will exclude the void legacies from the residue and cause an intestacy as to them, and they should therefore be held to fall into the residue.

It therefore follows that the whole of the residue, after the payment of the debts and valid legacies and the expenses of administration, should constitute a fund, the net income of which must be paid to the widow during her life. After her death, the shares of the residuary legatees not competent to take should pass as not disposed of by the will, and the balance of the residuary estate be divided among the other residuary legatees, as directed by the final clause of the will,

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subject to the law of 1860 as to the amount which can go to these corporations.

- The judgment should therefore be modified in conformity with these views.

All concur with MILLER, J., except RAPALLO and EARL, JJ., dissenting; ANDREWS, J., absent.

Judgment affirmed.

WILLIAM J. KENNEDY, Respondent, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

It seems, that the commissioner of public works in the city of New York, being charged with the care of the public buildings (§ 71, chap. 335, Laws of 1873), has the power to appoint janitors to take charge of the buildings in which the police and district courts are located.

Plaintiff was appointed by said commissioner janitor of the building occupied by the police court of the second district, and by the district or civil court of the third district; the justice of the latter court appointed C. janitor for that court. The board of estimate and apportionment made an appropriation for the salary of one janitor for said building, conditioned however, substantially, that no portion thereof should be paid by the comptroller to either appointee until the question was judicially determined that he was and that the other was not entitled to be paid. *Held*, that the appropriation could only be availed of in an action or submission, to which both claimants were parties, and then only on establishing that the power to appoint janitors was exclusive, either in the court or the commissioner, and that there could be but one janitor; and that, therefore, plaintiff was not entitled to judgment upon a submission of the controversy under the Code of Civil Procedure (§ 1279) as between him and the city, to which C. was not a party.

(Argued November 13, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, in favor of plaintiff, entered upon a case submitted under section 1279 of the Code of Civil Procedure.

Statement of case.

The facts stated were, in substance, as follows : In April, 1877, plaintiff was appointed by the commissioner of public works, in the city of New York, janitor of a public building in said city, occupied by the police court of the second district, and by the civil or district court of the third district. There were at that time twelve buildings occupied by the police and district courts ; of these there were six police courts and ten district courts ; four of the buildings being occupied by a police and a district court. The commissioner appointed a janitor for each of said buildings. The justice of the district court for said third district appointed Richard M. Collard a janitor of said court, and the justices of six other of the district courts also made similar appointments. Plaintiff entered upon and performed the duties of janitor. The board of estimate and apportionment, in their estimate for 1879, made an appropriation, entitled as follows :

“ Salaries of janitors of civil and police courts.”

“ To pay salaries of twelve janitors at \$1,200 each per annum, in the civil and police courts, as follows : ”

Then followed appropriations for the salary of one janitor for each building, among them the following :

“ One in the third district civil and second district police courts \$1,200.”

At the foot of the appropriation was the following :

“ The above appropriation of \$14,400 is made especially, as no provision is otherwise made in this final estimate for the salaries of the janitors of these courts. No portion of this appropriation, however, is to be paid by the comptroller until the question is judicially determined on an adjusted case or otherwise, in whom by law the appointment of janitors of these courts is placed. It is claimed on one hand that the appointment is in the board of police justices and the justices of the civil courts, and on the other that the appointment is in the commissioner of public works. The city is not to be burdened with the expense of two sets of janitors.”

The question presented for decision was, “ Is the commissioner of public works authorized to appoint a janitor for

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said building, and is the said Kennedy entitled to be paid from the said appropriation to the exclusion of the said Col-lard ?'

D. J. Dean, for appellant. The power to appoint janitors for the district courts is vested in the justices of those courts, and only their appointees are entitled to the salary provided for the place. (Laws of 1857, chap. 335, § 65; Resolutions of Common Council, October 6, 1878, and March 15, 1870.) The common council could delegate the power to appoint to the justices. (*Lee v. Sandy Hill*, 40 N. Y., 442, 451; *Hull v. Lauderdale*, 46 id., 70; *Brennan v. Mayor, etc.*, 62 id., 365; *McCollough v. Mayor, etc.*, Gen. Term, First Dept., Jan., 1876; *Sullivan v. Mayor, etc.*, 47 How., 491.)

Nelson J. Waterbury, for respondent. The commissioner of public works is authorized to appoint janitors for all public buildings, including those in which courts are held. (*Hartman v. Mayor*, Gen. Term, N. Y. C. P. [not reported].)

RAPALLO, J. We concur in the opinion of BEACH, J., at General Term in so far as it holds that the commissioner of public works, being charged with the care of public buildings, has power to employ janitors to take charge of the buildings in which the police and district courts are located, and that the duties of such janitors are confined to the care of the building and are essentially different from those of court attendants.

We are also of opinion that the appropriation out of which the plaintiff claims to be paid his salary, is in form sufficient to authorize such payment, except for the condition which is attached to it, viz.: That no portion of this appropriation is to be paid by the comptroller until the question is judicially determined in whom the appointment of janitors of the police and district courts is placed, which condition is accompanied with a statement of the opposing claims, on

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the one hand that the power of appointment is in the board of police justices and justices of the civil courts, and on the other that it is in the commissioner of public works, and that the city is not to be burdened with the expense of two sets of janitors.

The form of the appropriation indicates that the board of estimate and apportionment assumed that but one set of janitors could be appointed, and that the appointments by the commissioner of public works were the only valid ones, for they have made appropriation for the payment of only twelve janitors, corresponding with the twelve public buildings in which these courts are held, for each of which buildings the commissioner has appointed one janitor. But it appears in the case that in these twelve buildings sixteen courts are held, and if the power to appoint were in the courts, there would be at least sixteen janitors. It further appears that seven of these courts have appointed janitors in addition to the twelve appointed by the commissioner, and it is claimed on the part of these appointees, that each court has power to appoint a janitor for its own court room, even if the janitor in general charge of the building is to be appointed by the commissioner of public works. The appropriation in that event would be insufficient to pay either set of janitors, for it is on condition that the city is not to be burdened with the expense of two sets of janitors, and the comptroller is to pay only on its being judicially decided in whom the power of appointment rests. This assumes that but a single set of janitors can be appointed and the substance of the appropriation is that it is not to be paid to either until it is decided that the other is not entitled, and accordingly the question stated in the submission is whether the plaintiff, the appointee, of the commissioner of public works is entitled to be paid from the appropriation in question, to the exclusion of Collard the appointee of the court. Now if both are entitled to be paid, of course neither could recover, under this appropriation and submission, and if we should be satisfied that only one janitor could be legally appointed, then the controversy is

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in substance in relation to the conflicting claims of two parties to the same fund, which fund is subject to the condition that neither claimant shall be paid until it is judicially decided that the other is not entitled.

We apprehend that the judicial determination called for is one which shall be binding upon the adverse claimant, and shall relieve the city from any demand on his part. It is manifest that such a decision cannot be rendered in a proceeding to which but one of the claimants is a party, whatever may be our present opinion as to the right of the claimant before us. If he had brought a simple action for the recovery of his salary, an adjudication in his favor would not have estopped the adverse claimant from asserting his right, and the defendant might set up that there is no appropriation except on that condition. We can see no way in which either claimant can avail himself of the appropriation in the form in which it is made except in an action or submission to which both claimants are parties, and then only on establishing that the power to appoint janitors is exclusively either in the courts or in the commissioner, and that there cannot be two sets of janitors.

Whatever may be our opinion on these points, as to which the General Term of the Supreme Court and the Court of Common Pleas appear to have differed, it is very clear to us that we cannot pass directly upon the rights of Collard in this proceeding, to which he is not a party. (*Wood v. Squires*, 60 N. Y., 191.)

The judgment should be reversed and the proceeding dismissed, without costs to either party.

All concur, except FOLGER, J., absent.

Judgment accordingly.

Statement of case.

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162 426

HUGH W. COLLENDER, Respondent, v. GEORGE E. PHELAN
et al., Executors, etc., Appellants.

In an action for an accounting between a surviving partner and the representatives of a deceased partner, the former is entitled to credit for all sums paid by him to the latter, after their appointment, out of funds collected by him as surviving partner.

In the case upon appeal, in such an action, it appeared that plaintiff, the surviving partner, testified without objection to payments so made; in a subsequent part of the case it was stated that it was understood plaintiff should produce vouchers; it did not appear what vouchers were wanting, or that there was any application to strike out the testimony in default of such production, nor was there any objection, ruling or exception on the subject of the necessity of the vouchers. *Held*, that this question not having been raised on the trial could not be raised on appeal.

Plaintiff, in making payments of the indebtedness of the firm, advanced moneys from time to time from his own funds, in excess of the amount in his hands as surviving partner. *Held*, that he was entitled to interest on such advances.

The findings of the referee did not show upon what particular payments interest was allowed. *Held*, that it could not be claimed that too much interest was allowed, as there was no specific finding disclosing any such error.

To reverse the conclusions of law of a referee it must appear from the facts found that they are erroneous.

At the time of the death of P., the deceased partner, the firm had contracts for the manufacture and sale of articles under patents belonging to the firm or the partners jointly, which contracts were for a period extending beyond the time of such death. It appeared that large profits would have been realized by the firm, had it continued and the other parties had remained solvent, in carrying out said contracts; it did not appear, however, that they had any value aside from the value of the use of the patents. Defendants sold and assigned to plaintiff the interest of their testator at the time of his death in the stock, fixtures, etc., of the firm, and also in said letters patent, and in the lease of the warehouse occupied by the firm, plaintiff agreeing to assume and pay all salaries due employees, etc., accruing subsequent to the death of P. In none of the writings was any reference made to the outstanding contracts, *held*, that the transfers, etc., afforded a strong inference that the intent of the parties was that plaintiff should continue the former business on his own sole account, and that no benefit was intended to be reserved to defendants from manufactures under said contracts; and that a finding that defendants were not entitled to any credit or allowance on account of the contracts was justified.

(Argued November 17, 1879; decided January 13, 1880.)

Opinion of the Court, per RAPALLO, J.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts are set forth sufficiently in the opinion.

John Joroloman, for appellants. The referee erred in allowing plaintiff interest on the excess of advances. (Parsons on Part., 229, note Y; *id.*, 443, 444.) A surviving partner is not entitled to commissions in settling up the co-partnership. (Collyer on Part., § 199, note 3; Story on Part., § 331; Parsons on Part., 229, 330, 443, 444; *Johnson v. Hartshorne*, 52 N. Y., 180.)

M. Nolan, for respondent. The advances made by plaintiff were a proper charge against the estate of defendants' testator. (2 Greenl. Evi., § 518.) As neither statute nor rule has provided for procedure in an action for accounting, the old practice prevails. (1 Barb. Chy. Pr., 506; *Wiggins v. Gans*, 4 Sandf. 546; *Palmer v. Palmer*, 13 How. Pr., 364; 2 Daniel's Chy. Pr., 1221.) Plaintiff having agreed with defendants to assume the whole business after October 7, 1871, and to exonerate them from expenses from that date, they are not entitled after that time to share in the profits. (Phillmore's Maxims, 138; New Civil Code, § 1953; 3 Kent's Com., 28, 29.) Frauds must be pleaded specially, as well in accounts as in other actions. (*Wilder v. Adams*, 2 Woodb. & Minot, 329; Bliss' Code, 360, note i.)

RAPALLO, J. This action was for an accounting between the plaintiff, as surviving partner of the late firm of Phelan & Collender, consisting of the plaintiff and Michael Phelan, deceased, and the defendants as executors and executrix of the deceased partner. The questions before us arise upon exceptions to the report of the referee settling the account.

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The first exception is to the allowance to the plaintiff of an item of \$3,544.12, which was the aggregate of various small sums charged by plaintiff in the statement of his accounts presented to the referee, as payments made by plaintiff for account of the estate of M. Phelan, deceased. It is claimed by the appellants that these payments were not proven. The referee states in his report that the testimony was uncontradicted that such payments were made at the request of the defendants. On reference to the testimony we find that the plaintiff so testified. It is further objected that the plaintiff failed to produce vouchers therefor. We find no exception in the case which raises the point that the production of such vouchers was necessary. The plaintiff was allowed without objection to testify to the fact of the payments. It is stated in a subsequent part of the case that it was understood that the plaintiff would produce vouchers, such as had not already been produced, for these payments, but it does not appear that the matter was followed up, nor what vouchers were wanting, nor that there was any application to strike out the testimony in default of the production of vouchers, nor any objection, ruling or exception on the subject of the necessity of the vouchers. The question not having been raised on the trial cannot be raised on appeal. The allowance of the item cannot be said to be entirely without proof, and therefore the finding of the referee cannot be held erroneous in law.

It is further objected that the testimony shows that these payments had no connection with the partnership matters, but were individual transactions between the plaintiff and the executors, after the death of Phelan. This would not, we think, deprive the plaintiff of the right to credit for the payments. The plaintiff was entitled to credit for all sums paid the executors out of the funds collected by him as surviving partner, as they were the proper and only parties who could receive them as the representatives of Phelan. It is claimed that the testimony shows that the payments were made to the executors for their individual use. The referee has not

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so found, and the testimony on the point is ambiguous. The plaintiff first stated that they were made at the request of the defendants for the estate of Mr. Phelan, and then gave an affirmative answer to the interrogative statement of defendants' counsel, "That is for their individual use—the executors?" The referee may well have construed this answer as not intended to convey that the payments were not made to or for the executors as such. No sufficient facts or exceptions appear to justify us in reversing the allowance of this item by the referee.

The second, third and fourth exceptions relate to matters of fact. The findings of the referee are not shown to be unsupported by any evidence, and no question of law arises upon these exceptions. The fifth and sixth exceptions relate to the allowance of payments for rent and indebtedness of the Columbia billiard room and the Montreal billiard room. Although these payments appear to have been made and charged after the death of the testator, which was October 7, 1871, the referee finds that the rents and indebtedness accrued before that time. The testimony of the plaintiff was that he charged the estate with the rent up to Mr. Phelan's death, and charged all the rest to himself subsequently. The finding was not without evidence. The seventh exception is to the allowance to the plaintiff of interest on his advances. The referee finds that the plaintiff, in making payments of the indebtedness of the firm, advanced moneys from time to time from his own funds, in excess of the amount in his hands as surviving partner, and the referee allowed interest on such advances. In this we find no error. (*Dougherty v. Van Nostrand*, 1 Hoff. Chy. Rep., 68, 69.) The defendant claims that there is an error in the amount of interest allowed, but there is no specific finding which discloses any such error. The appellant seeks to impose upon this court, virtually, the task of rehearing the case as referees, and reviewing the testimony and the facts, and stating an account between the parties. This cannot be done. To review the conclusions of law of the referee, it must appear

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from facts found that they are erroneous. The testimony cannot be resorted to for that purpose. The findings of fact do not show upon what particular payments interest was allowed, and it does not appear from the findings that interest was allowed on items excluded and payments disallowed, as claimed in the appellants points. The eighth exception is to the finding of fact that there was no proof before the referee from which he could determine the value of the contracts for billiard cushions, referred to in the finding. This exception may be considered in connection with the eleventh, which is to the conclusion of law that the defendants are not entitled to any credit or allowance for or on account of any of the contracts for billiard cushions.

The facts found in respect to these contracts are, that at the time of the death of Michael Phelan the firm had contracts with different parties for the manufacture and sale of billiard table cushions, under patents issued by the United States, which belonged to Phelan & Collender jointly, or to the firm, which contracts by their terms extended for periods beyond the death of Phelan, and that if the firm had continued, and the parties with whom the contracts were made had remained solvent, and the firm had continued the owners of the patents, the plaintiff and Phelan would have realized large profits in carrying on said contracts.

It also appears from the findings that Phelan died on the 7th of October, 1871, and that on the 17th of November, 1871, the defendants sold and transferred to the plaintiff for \$40,000, Phelan's half of all the stock which belonged to the firm at the time of Phelan's death, and of all fixtures, furniture, etc., according to a schedule annexed to the bill of sale. In that schedule was a valuation of the articles enumerated therein, composing the stock of the firm, which valuation amounted to \$72,013.78, to which was added cash in bank, October 7, 1871, \$7,331.84, and at the foot was added a memorandum signed by the parties as follows: "Upon settlement it was agreed that all the above, estimated at

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\$80,000, for undivided half of which Mr. Collender agreed to pay \$40,000."

No reference was made in the bill of sale or schedule, to the contracts in question.

By an instrument dated December 30, 1871, the defendants, in consideration of \$10,000, assigned and transferred to the plaintiff all the interest which Michael Phelan had in all letters-patent owned by Phelan & Collender jointly, or by the firm. It is found that this assignment included the patents under which the cushions before mentioned were to be manufactured, and the finding is not excepted to.

It further appeared in evidence that in November, 1871, the defendants assigned to the plaintiff the lease of the warehouse of the late firm, and by a further instrument dated in the same month, and reciting the sale to the plaintiff of the share of the deceased partner in all the stock of said firm, the plaintiff agreed with the defendants that he would individually assume and pay all salaries due any servants, employes or workmen of whatsoever nature, employed by the late firm, accruing subsequent to October 7, 1871, the date of Phelan's death.

In none of these instruments is there any reference to the outstanding contracts for the manufacture of cushions. But the facts of the sale to the plaintiff of all the interest of the deceased partner in the lease of the warehouse and in the stock of the firm and in the patents which were necessary to the performance of these contracts, and the assumption by the plaintiff of all the wages of employes and workmen, afford a strong inference that the intent of the parties was that the plaintiff should continue the former business on his own sole account, and that no benefit was intended to be reserved to the defendants from the manufacture of cushions under the pending contracts.

If this portion of the business was to be continued for the joint benefit of the estate and the surviving partner, it is natural to suppose that some provision would have been made respecting it, in the various agreements for the sale of

stock and patents, and the assumption by the survivor of all expenses for salaries and labor accruing after the date of Phelan's death. It would not be reasonable to suppose that it was the intention of the parties that the plaintiff should go on and complete these contracts at his own expense and risk, and devote his time and services gratuitously thereto, and also give to the executors the benefit of the patents which he had purchased of them and for which he paid a large consideration. All these matters would naturally have been the subject of some agreement, if the intention had been that the executors should remain interested in the contracts. But on this point we are not left merely to conjecture. There are facts and testimony to guide us, which, although not incorporated in the findings, may be resorted to to sustain the judgment. These contracts were for the manufacture of a patented article. Apart from the right to the patents the contracts were of no value, for they could not be performed. The defendants having for a large consideration sold all their interest in the patents to the plaintiff, he would, in case he were bound to give the representatives of his deceased partner the benefit of the contracts, have been entitled to an allowance, not only for his expenses, but for the use of his patents, and although it appears that the plaintiff derived profits from the performance of the contracts, there is no evidence to indicate what their value would have been, or that they would have had any value, after making these allowances, nor was there any agreement as to the use of the patents in the performance of the contracts. The plaintiff testified that the understanding was that he took all the business from the seventh of October, assumed all the debts and had all the contracts. This testimony was objected to, but it was not stricken out nor asked to be stricken out, nor are we referred to any testimony contradicting it. On the contrary George E. Phelan, one of the executors, testifies that the plaintiff was to assume everything from the date of his father's death, and in reference to the assignment of the patents and trade marks, he testified that the arrangement as to the time the

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agreement should go into operation was, that everything should date from his father's death, the same as the stock. If the performance of the contracts had resulted in a loss, it is very clear that the defendants would not, under the arrangements made with the plaintiff, have deemed themselves chargeable with any portion of such loss, nor of any damages for which the plaintiff might become liable under the contracts.

We think the special circumstances of this case, in connection with the dealings between the plaintiff and the executors, sufficient to sustain the conclusions of the referee, without infringing upon the general principles upon which a surviving partner is held accountable for all profits arising from the use of the firm property.

No other exceptions are referred to in the plaintiffs points.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

EDWARD B. JUDSON et al., Executors, etc., Respondents, v.
SAMUEL N. DADA, Appellant, WILLIAM McMAHON et al.,
Respondents.

One who purchases a part of mortgaged lands, and agrees with his grantor to assume and pay the whole mortgage, may discharge his land from the consequences of that assumption, by agreement made with his grantor while the latter is still the owner of the residue, and a grantee of the residue, after such discharge, cannot claim the benefit of the assumption. The grantee succeeds only to the equities of his grantor, existing at the time of the conveyance, and that without regard to any question of notice.

Defendant A. being the owner of certain premises, subject to a mortgage then on record, sold and conveyed a portion thereof to D. and M., which, as stated in the deed, was "supposed to be eighty acres," the grantor covenanting that in case of a deficiency she would pay therefor at the rate of thirty dollars per acre; the grantees, as the consideration for the conveyance, assumed and agreed to pay the whole mortgage; subse-

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quently, it having been ascertained that there was a deficit in quantity of the land conveyed, A. executed to her said grantees a writing agreeing that she would save them harmless, to the amount of \$273.32, the sum agreed to be paid for such deficit, from any claim under the mortgage. A. subsequently conveyed the residue of the premises to other parties, covenanting that the same was free and clear of all incumbrances. In an action to foreclose the mortgage, *held*, that the grantees of such residue were entitled to no other or greater equities than those which A. had at the time she conveyed; that the residue was presumably chargeable in equity with the payment of \$273.32 of the mortgage, and the portion so conveyed to D. and M. was chargeable with the balance; that the fact that the covenant of D. and M. to pay the mortgage was contained in a deed on record was immaterial; as were also the facts that the agreement of A. to reassume the amount of the rebate for the deficiency, was not on record, and that the grantees of the residue had no notice thereof.

Such an agreement is not within the recording act.

As to whether the personal liability incurred by the first grantees to the holder of the mortgage, by assuming its payment, could be discharged by subsequent agreement between them and their grantor, *quære*.

So also *quære*, as to whether sufficient was not disclosed in the first deed to put the subsequent grantees upon inquiry, and charge them with constructive notice of the release by A. of the covenant of D. and M. to the extent of the value of the deficit, in case a notice was necessary.

(Argued November 19, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment entered upon the report of a referee.

This was an action to foreclose a mortgage securing the sum of \$4,500, executed by defendant, Hannah A. Avery, to Burr Burton, plaintiffs' testator, dated October 12, 1863. After the said mortgage was executed and recorded, defendant Dada and one Morrill purchased from Miss Avery, the mortgagor, a part of the mortgaged premises. Their deed stated that the parcel conveyed was "supposed to be eighty acres," and that any excess or deficiency should be paid for at the rate of thirty dollars an acre. The deed by its terms was made subject to the Burton mortgage, which was assumed by the grantees, and agreed to be paid by them as the purchase-price of the land. To secure such payment, the grantees gave to the grantor a mortgage on the land conveyed to

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them, of even date with the deed. Subsequently, it was ascertained that there was a deficiency in the land conveyed to Dada and Morrill, and Miss Avery gave to her said grantees a writing allowing them the sum of \$272.32 on account of such deficiency, and agreeing to save them harmless from the Burton mortgage to that amount. The writing was not recorded. Thereafter, Miss Avery commenced an action to foreclose her mortgage, in which Dada and Morrill were credited with the amount so allowed for deficiency, and the amount found due and unpaid upon the Avery mortgage, after deducting such credit, was paid by them, and the payment was allowed upon the Burton mortgage. Morrill afterwards assigned his interest in the premises to Dada. Subsequently the defendant McMahon purchased from Miss Avery a portion of the mortgaged premises, and afterwards defendant Green purchased the residue, for which they paid value. The referee found that they purchased without notice of the deficiency in the quantity of land conveyed to Dada and Morrill, and also without notice of the agreement between them and Miss Avery respecting the deficiency, and of the allowance made to them on account of it in her foreclosure suit, and he decided the parcel conveyed to Dada was liable to be sold before those conveyed to McMahon and Green, under the foreclosure sale in this action. Dada claimed that his part of the mortgaged premises should not be charged primarily with the \$273.33 and interest.

Samuel N. Dada, for appellant. Green cannot claim to have been a *bona fide* purchaser. (15 N. Y., 354; 26 id., 18; 39 id., 70; 50 id., 349.) After the equitable burden, as between Miss Avery and Morrill and Dada, had once attached to her land, no act of hers, or ignorance of Green, as purchaser from her, could remove the burden and replace it upon the land of Morrill and Dada. (6 N. Y. W. Dig., 420; *How. Ins. Co. v. Halsey*, 4 Seld., 274; *Clowes v. Dickenson*, 5 J. C. R., 235; *Guion v. Knapp*, 6 Paige, 35; *Thomas on Mortgages*, 93; *Stephens v. Casbacka*, 3 N. Y. W. Dig., 237; *Hartley*

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v. *Harrison*, 24 N. Y., 170; *Flagg v. Munger*, 9 id., 583; *Stuyversant v. Hall*, 2 Barb. Chy., 151; *Stuyversant v. Hone*, 1 Sand. Chy., 425; *Guion v. Knoble*, 6 Paige, 35; *Libey v. Wolf*, 10 Ohio, 80; *Williams v. Sorrell*, 4 Ver., 389; *Bushe! v. Bushel*, 1 Sch. & Lef., 90.)

Joshua B. Randall, for respondents. Plaintiffs must first exhaust their remedy against the Morrill and Dada purchase, before they can resort to Green's land. (*Jumel v. Jumel*, 7 Paige Chy., 591; *Halsey v. Reed*, 9 id., 446; *Marsh v. Pike*, 10 id., 595; *Blyer v. Monholland*, 2 Sand. Chy., 478; *Thomas on Mortgages*, 93, 187; *Russel v. Pistor*, 3 Seld., 171; *Atlantic Dock Co. v. Leavitt*, 54 N. Y., 35, 39; *Comstock v. Drohan*, 71 id., 9; *Caloo v. Davies*, 73 id., 211.) The plaintiffs can maintain a personal action against Morrill and Dada on their promise to assume and pay the Burton mortgage. The conveyance of Miss Avery being absolute, so is their promise to pay also absolute, and as the conveyance cannot be withdrawn, the promise of assumption and payment cannot be. (*Garnsey v. Rogers*, 47 N. Y., 233, 242; *Burr v. Beers*, 24 id., 178; *Thorp v. Keokuk Coal Co.*, 48 id., 253; *Comstock v. Drohan*, 71 id., 9; *Ricard v. Sandler-son*, 41 id., 179; *Thomas on Mortgages*, 93; *Wood v. Smith*, 20 Albany Law Journal, 38; *Douglass v. Wells*, 8 W. Dig., 552; *Mills v. Watson*, 1 Sweeney, 74; *Binsse v. Paige*, 1 Abb. Ct. Appeals, 138, note.) The unrecorded agreement between Miss Avery and Morrill and Dada, by which Dada now seeks to have his purchase discharged from the payment of a portion of the Burton mortgage, is ineffectual against subsequent purchasers (without notice). (*St. John v. Spaulding*, 1 T. & C., 483; *Driggs v. Simons*, 3 id., 786; *Stuyversant v. Hall*, 2 Barb. Chy., 151, 160.) Dada is estopped from now insisting that his own lands are not first liable; Green having acted on Morrill and Dada's covenants in the deed and mortgage. (*At. Dock Co. v. Leavitt*, 54 N. Y., 40.)

RAPALLO, J. The equity of the defendants McMahon and Green to have the land of the defendant Dada first sold for

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the payment of the plaintiffs' mortgage, did not arise out of any contract or dealing between them and Dada, but was derived wholly through their grantor Miss Avery. By reason of the assumption of the payment of the plaintiffs' mortgage by Dada and Morrill in the conveyance to them by Miss Avery, of a part of the mortgaged premises, she became equitably entitled (in the absence of any defense against the covenant as between her and them,) to have the land conveyed by her to them first sold, in case of a foreclosure of the mortgage, in exoneration of the residue of the mortgaged premises retained by her. Her subsequent grantees of this residue succeeded to whatever equitable rights she had under this covenant in respect to the land conveyed by her, but nothing more. They could not derive through her any other or greater equity than she herself possessed at the time of her conveyance to them. They never had any equity except such as then attached to the land conveyed, and passed as incident to the conveyance. They took her covenant that the land she conveyed to them was free from incumbrances. The plaintiffs' mortgage was at the time a recorded lien upon all the property. At the same time the covenant between Miss Avery and Dada and Morrill, which was also on record, apparently, as between Miss Avery and Dada and Morrill, constituted the land conveyed to them the primary fund for the payment of the mortgage. It may be supposed, though the fact does not appear in this case, that McMahon and Green relied upon this covenant as well as upon the covenants of Miss Avery with them, for their protection. But long before Miss Avery's conveyance to them, and while she was still owner of the land afterwards conveyed to them, she had in substance released Dada and Morrill from their assumption of the mortgage, to the extent of \$273.32, and as between her and them her land was primarily chargeable in equity with that portion of the plaintiffs' mortgage, and their's was chargeable only with the residue. I am unable to comprehend upon what principle her subsequent grantees could become entitled to any greater equity than she had.

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If in consequence of her dealings with Dada and Morrill the primary fund for the payment of the mortgage had been diminished, and the land afterwards conveyed by her to McMahon and Green had consequently become deprived of its protection as to a portion of the recorded mortgage, their remedy was against Miss Avery upon her covenant,—and not against the defendant Dada to revive a liability from which he and his land had been discharged by their grantor before her conveyance to them.

Stress is laid upon the fact that the covenant of Dada and Morrill was contained in a deed upon record, but I cannot see that this gives the respondents any greater rights than they would have if the covenant had been contained in a separate instrument of which they had notice. It was equally subject to any defense which might exist as against Miss Avery, at the time she conveyed.

It is also urged that Miss Avery's agreement to credit, as a payment on the mortgage, the amount of the rebate for deficiency in the quantity of land, was not on record, and therefore was not binding upon her subsequent grantees for value without notice. This agreement was not within the recording act. It might as well be contended that an unrecorded release of part of a mortgage debt or of part of mortgaged premises by mortgagee to mortgagor was not binding upon a subsequent assignee of the mortgage without notice. The transaction was not a conveyance of real estate and did not come in any aspect within the recording act, and putting it on record would not have been notice to McMahon and Green. The case presents a mere conflict of equities between the defendant Dada, who claims that his land was partially discharged from his assumption of the \$4,500 mortgage, and the respondents, who claim that they bought relying upon that assumption, or are entitled to the benefit of it. The equities of the appellant being the first in point of time should prevail. It is impossible I think to hold that one who purchases part of mortgaged lands and agrees with his grantor to, assume the whole mortgage in exoneration of the residue of

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the lands, cannot discharge his land from the consequences of that assumption, by agreement with his grantor, made while still the owner of the residue of the land subject to the mortgage, and that a subsequent grantee of such residue of the land can claim the benefit of the assumption, notwithstanding such discharge.

The case would be quite different if the discharge had been given after the grantor had sold the residue of the land to a party who had relied upon the assumption. It might then be beyond the control of the grantor, the rights of third parties having attached.

The question whether the personal liability incurred by the first grantee to the holder of the mortgage, by assuming the payment of it, could be discharged by agreement between the grantor and grantee, is not involved in this case. It depends upon different considerations. But even that liability depends upon the nature of the dealing in which the assumption is made, and is subject to any condition or defeasance attached thereto. (*Garnsey v. Rogers*, 47 N. Y., 233.) And if the consideration for the assumption fails, or there is a good defense to it as between the parties, it is difficult to say that it can nevertheless be enforced by the mortgagee. A contemporaneous agreement on a separate paper will qualify or control it even as to the mortgagee. (*Flagg v. Munger*, 9 N. Y., 583.)

It is further claimed on the part of the appellant that the deed itself in which the assumption is contained, disclosed enough to put the respondents on inquiry and charge them with constructive notice of the release by Miss Avery of the appellant's covenant to the extent of the value of the land which was deficient. It appeared on the face of the deed that the consideration of the assumption was the conveyance by Miss Avery to Dada and Morrill of a piece of land, part of the mortgaged premises, supposed to contain eighty acres and that it was agreed between the parties that if the quantity was less or more than eighty acres the excess or deficit should be paid for at the rate of thirty dollars per acre. Whoever purchased the land relying upon the assump-

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tion was thus notified of the consideration thereof, and that if the land conveyed to Dada and Morrill fell short, and Miss Avery failed to pay Dada and Morrill for the deficiency, they would be equitably entitled to be relieved from their undertaking to pay the \$4,500 mortgage to the extent of the agreed valuation of such deficiency, and Miss Avery's remaining land would be subject to that amount, and the question is presented whether under these circumstances the subsequent purchasers from Miss Avery, with notice of this infirmity in the assumption, or that it was subject to the contingency referred to, were not bound to inquire whether any deficiency had been discovered and ascertained, and if so, whether it had been paid for, as agreed. Such an inquiry would have disclosed the fact that a deficiency had been ascertained and settled for by relieving Dada and Morrill from their assumption to that extent, and the point arises whether upon the principle recognized in *Williams v. Brown* (15 N. Y., 354), the respondents are chargeable with constructive notice of these facts. We do not consider it necessary to determine this point, as it is sufficient for the decision of the case that the grantees of Miss Avery succeeded only to such equities as she actually had at the time of her conveyance to them, without regard to the question of notice, and that they can claim no greater equities than she could have claimed, had she still continued to be owner.

That part of the judgment or decree which is specified in the notice of appeal to the General Term should be reversed. The judgment of foreclosure and sale should stand, and judgment be rendered in favor of the appellant on the question of the order in which the mortgaged premises shall be sold.

The plaintiffs costs on this appeal should be paid out of the proceeds of sale, and the appellant Dada should recover his costs of the appeals to the General Term and to this court. The form of the judgment should be settled on notice.

All concur, except ANDREWS, J., taking no part; DANFORTH, J., concurring in result.

Judgment accordingly.

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WILLIAM H. HARRIS, Appellant, v. WILLIAM M. KASSON.
Respondent.

Plaintiff's complaint alleged a sale and delivery to defendant of certain tools and machines. Plaintiff's evidence was to the effect that by a contract between him and G., he sold and assigned to G. the articles in question with other property, the latter agreeing to start a manufacturing business, and to continue the same for two years, employing plaintiff therein, and paying him one-half the profits. At the expiration of the two years, if G. concluded to give up the business, he agreed to reassign to plaintiff upon being refunded the sum paid, and certain expenses and disbursements; in case G. concluded to continue the business, he had the right so to do for three years longer on the same terms and conditions, and at the end of the three years he agreed to reassign to plaintiff, on being reimbursed as aforesaid, or to take plaintiff into partnership. Defendant subsequently agreed to pay plaintiff \$300 to release or transfer whatever rights he had under the contract to G., so that the latter might convey to defendant's son a clear title to the property; this plaintiff did, and G. conveyed. Plaintiff asked to recover the \$300. Defendant moved for a nonsuit, on the ground that the evidence failed to establish a sale and delivery of goods as alleged in the complaint. No attempt was made to obviate the objection by amendment, and the motion was granted. *Held*, no error; that the contract between plaintiff and G. conveyed the legal title to the property in question to the latter, plaintiff retaining no interest, the transfer of which could be treated as a sale and delivery of goods; that assuming plaintiff had an equitable interest, an agreement to pay for a release of this interest could not sustain the action.

(Submitted November 24, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of defendant, entered upon an order overruling exceptions and directing judgment upon an order nonsuiting plaintiff on trial.

The complaint in this action alleged a sale and delivery by plaintiff to defendant of certain tinners' machines and tools specified at, and for the price of, \$300.

Plaintiff's evidence was to the effect that in March, 1869, he and one Gilbert entered into a written contract, by the terms of which plaintiff, for the consideration of \$200, and of the agreement by Gilbert, sold and assigned the property in question, with certain letters patent, to Gilbert, Gilbert

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agreeing to procure a suitable store or shop, and to go into the tin, copper and sheet iron business, and if the same proved remunerative to continue the business for two years, employing the plaintiff therein and paying him for his services one-half the net profits. At the conclusion of the two years, if Gilbert decided to give up the business, he agreed to reassign the property conveyed on being refunded the \$200 and the costs of new patterns, materials, stock, etc., then on hand; in case he concluded not to give up the business, he was authorized to continue the same three years longer on the same terms and conditions, and at the end of the three years to surrender it and assign the property to plaintiff, on being refunded the cost as aforesaid. Defendant having opened negotiations with Gilbert to buy-out the business for his son, he agreed to pay plaintiff \$300 for his interest, which the latter agreed to transfer to Gilbert, so that he could transfer the whole to defendant's son; the transfers were made accordingly.

At the close of plaintiff's evidence defendant's counsel moved for a nonsuit, on the ground that the complaint was for goods sold and delivered, and that the evidence failed to establish any such sale; the motion was granted, to which plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at Special Term.

John C. Strong, for appellant. The taking possession of the property was a completion of the purchase, and took the case out of the statute of frauds. (*McKnight v. Dunlop*, 5 N. Y., 537; *Houston v. Shindler*, 11 Barb., 36; *West v. Newton*, 1 Duer, 277.)

Sherman S. Rogers, for respondent.

RAPALLO, J. One of the grounds of nonsuit was that the complaint was for goods sold and delivered, and that the evidence failed to establish any such sale. No attempt appears to have been made to obviate this objection by amendment, and the question is therefore sharply presented

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whether a cause of action for goods sold and delivered by plaintiff to defendant was made out. Even though we should be of opinion that some other cause of action might be spelled out of the evidence, it would not aid the plaintiff on this appeal.

We think that under the contract of 1869, between the plaintiff and Gilbert, the legal title to the tools and patterns in controversy became vested in Gilbert, and that all the plaintiff had was the personal covenant of Gilbert to resell the same to him in the events and on the conditions specified in the contract, or to take the plaintiff into partnership at the end of five years if the business should not sooner be given up. We do not think that the plaintiff retained any title to the property, a transfer of which to a third party could be treated as a sale and delivery of goods. The agreement between the plaintiff and defendant, to which the plaintiff testified, although he calls it a sale of his interest, was in substance that the defendant would pay the plaintiff \$300 for releasing or transferring whatever rights he had under the contract, to Gilbert, so that Gilbert might convey a clear title to the property to the defendant's son, and the latter might go on with the business in connection with plaintiff, or employing plaintiff as Gilbert had done, but free from any agreement to resell. "Without any drawback or comeback," as the plaintiff expresses it. Even assuming that the plaintiff, under his contract with Gilbert, had some equitable interest in the property which could be enforced against a vendee of Gilbert who had notice of the plaintiff's rights, proof of an agreement by the defendant to pay the plaintiff for a release of such equitable interest could not sustain an action for goods sold and delivered by plaintiff to defendant. The sale and delivery proved, were by Gilbert, who had the legal title, to the defendant's son, and not by the plaintiff to the defendant.

The judgment should be affirmed.

All concur.

Judgment affirmed.

IN THE MATTER OF THE PETITION OF JAMES VAN BUREN
TO VACATE AN ASSESSMENT.

The only power conferred upon the board of health by the provisions of the act of 1871, "to provide for the proper drainage of lands," in the city of New York (chap. 566), is to direct the drainage of land by means other than sewers, where surface water, injurious to public health, could not be carried off by the sewers; and to assess the expense upon lands benefited by the drain, the area of assessment being restricted to the lands between the drain and the adjacent streets and avenues.

The commissioner of public works, in pursuance of a requisition of the board of health, directing him to cause the lands within certain bounds, which included many blocks and about seventy acres of sunken land, to be drained by other means than sewers, caused drains to be dug and the lands to be filled in, the whole cost of the improvement being about \$303,000, of which only \$5,491.20 was for drains; \$248,534.27 of the cost was assessed in one assessment upon the property owners, blocks of land being assessed through which the drains did not run. *Held*, that said act did not authorize such improvement; also that, even if the filling in could be claimed as merely an incident to the construction of the drains, the assessment was illegal, as there was no authority for mingling in one assessment the costs of drains running between different streets.

(Argued November 23, 1879; decided January 13, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming an order of Special Term, which vacated an assessment upon certain lots owned by the petitioner in the city of New York. (Reported below, 17 Hun, 527.)

The facts appear sufficiently in the opinion.

William C. Whitney, for appellant. The presumption is in favor of the regularity of assessments as of all other acts of public officers, and the burden of proof is upon the petitioner to show grounds for the vacation. (*In re Hebrew Ben. O. Asylum*, 70 N. Y., 476; *In re Second Ave. Bapt. Church*, id., 613; *In re Bassford*, 50 id., 512; *In re Williamson*, 3 Hun, 65, 68; *Bigelow v. City Boston*, 120 Mass., 326; *Jordan D. and D. Ass'n v. Wagoner*, 33 Ind., 50.) This is not a case in which, as matter of law, the city was

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under any obligation to acquire from the owners the right to perform this work. (*People v. Nearing*, 27 N. Y., 306; *People v. Haines*, 49 id., 587; *In re Rhineland*, 68 id., 165; *In re Ryers*, 72 id., 1.) A similar power to that exercised in this case has been possessed by the city under the statutes of this State at least since 1813. (Act of 1813, §§ 267, 270, 271.) The city had the right to order the improvement and lay the assessment. (Cooley on Taxation, 402; *Bliss v. Kraus*, 16 Ohio St., 55; *Sessions v. Crunkilton*, 26 id., 349; *O'Reilly v. The Draining Co.*, 32 Ind., 169; *Commonwealth v. Alger*, 7 Cush., 84.) There is no law against putting in one contract, and including in one assessment list, work upon several blocks.) *In re Ingraham*, 64 N. Y., 310.) The petitioner, having stood by, knowing that the work was being performed upon his land, and having made no objection thereto, is estopped from disputing the right of the city to enter upon the land and perform the work, and is precluded from disputing the validity of the assessment. (*People v. Utica*, 65 Barb., 1; *State v. Passaic*, 38 N. J. L., 171, 190.)

Charles E. Miller, for respondent. The construction of the drain was a trespass, for which no assessment could be laid. (*In re Cheseborough*, 78 N. Y., 232.)

RAPALLO, J. The work for which the assessment complained of was laid, consisted mainly of filling in sunken land lying between and bounded by Ninety-second and One Hundred and ninth street, Third avenue and the East river, in the city of New York, comprising many blocks of land. The whole expense of this improvement, which was assessed upon property owners, was included in one assessment, and apportioned on the several lots within the area before mentioned. The total cost of the work was \$307,948.83 which embraced the following items :

3,328 feet drain at \$1.65.....	\$5,491 20
139,776 feet BM. foundation plank.....	4,193 28

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431,619 cub. yards earth filling at 65 cents---	\$280,552 65
Surveyor's fees-----	14,512 00
Inspector's time, 800 days-----	3,200 00
	<hr/>
	\$307,948 83

Of this amount \$248,534.27 was assessed upon the property alleged to be benefited.

There was no ordinance or resolution of the common council authorizing this extensive improvement, but it was made by the commissioner of public works in pursuance of a requisition of the board of health, directing him to cause the plots of land within the bounds before mentioned to be drained by other means than by sewers, under and by virtue of the provisions of chapter 566 of the Laws of 1871.

These provisions are as follows :

Section 1. "Whenever it shall appear to be necessary for the protection of the public health that any plot or parcel of land within the corporate limits of the city and county of New York needs to be drained by other means than by sewers, and it shall be so certified by the city sanitary inspector and said certificate is filed among the records of the board of health of the health department of said city, the said board shall direct the same to be done by and under the direction of the department of public works of said city and county."

Section 2. "All parts and parcels of land lying below the level of the sewers adjacent thereto, upon which surface water remains stagnant, or through which water-courses have or at present do run, may be so *drained* by a properly constructed blind drain which shall be carried along such natural water-course until it can be made to enter any sewer at its proper level, or if such sewer cannot be reached it shall be carried to the adjacent river."

Section 3. "All lands benefited by said *drain* directly or indirectly for a distance from said drain included between the adjacent streets and avenues thereto, shall be liable to assessment thereon *pro rata*, in proportion to the direct or

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indirect benefit derived from the construction of said *drain*. The assessment to be made and collected as other assessments for the public benefit are provided for," and to become a lien, etc.

It is very apparent from the reading of this act, that the summary proceeding thereby authorized, was intended to apply to cases where surface water not capable of being carried off by the sewers, could be removed by the construction of drains. There is not a word in the act which purports to empower the commissioner of public works, on the simple requisition of the board of health, to make such an extensive and costly permanent improvement as is shown in the present case. The improvement actually made under color of their order was the redeeming, raising and filling in of upward of seventy acres of sunken land, at an expense of several hundred thousand dollars while the expense incurred for the construction of drains was only about \$5,000. The only power conferred upon the board of health is to direct the *draining* of land by means other than sewers. The second section prescribes how the lands may be *so drained*, that is by a properly constructed blind drain; and the only authority to assess is in section third, that all lands benefited by *said drain* shall be liable to assessment, but the area of assessment is restricted to the land between said drain and the adjacent streets and avenues, and the assessment is to be *pro rata* in proportion to the benefit derived from the construction of said *drain*. The intent evidently was to provide an expeditious mode of removing surface water injurious to the public health where that end could be attained by the construction of drains in the manner described in the act. It may be that some filling might be necessary as incidental to the construction of such drains, but it cannot be pretended that the raising of the vast number of sunken lots involved in the improvement in question was incidental to the construction of the drains. The drains were a comparatively insignificant part of the work done, and on many of the blocks filled in and raised, no drains whatever were constructed. The work

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was a permanent improvement, occupying three years in its construction, and not of the kind which the board of health was authorized to direct in cases of emergency.

The filling in of sunken lots is provided for by another statute, which has not been followed in the present case, and which provides a rule for assessing the expense, very different from that adopted by the commissioner of public works in this case. By the act of April 9, 1813 (2 R. L., 342), ample powers are given to the corporation of the city of New York to make the improvement which has been made under color of the order of the board of health. By section 267 of that act (2 R. L., 445), the Mayor, etc., in Common Council convened are empowered among other things to make ordinances for filling up, draining and regulating grounds that are sunken, damp, or unwholesome, or which they may deem proper to fill up, drain, raise, lower or regulate, and also for causing all such lots of ground adjoining to Hudson's river or to the East river or Sound as they may from time to time think proper, to be filled up with wholesome earth or other solid material, and for compelling the proprietors of such lands to make bulk-heads and raise and fill up the lots, etc. Section 270 provides that the corporation may in all cases when they deem it necessary for the more speedy execution of said ordinances, cause the work to be done at their own expense, on account of the persons upon whom the same may be assessed, and levy the same with interest and costs on the goods and chattels of the proprietors or occupants of the property upon or by reason of which such sum shall have been assessed, or recover it by action from the persons on whose account the expense shall have been incurred, and by section 271 the expenses thus paid by the corporation on account of others are made a lien upon their property.

Under this statute the proprietors are made to pay the expense of filling up and raising or redeeming their own property, and it is not, as in the present case, charged upon their neighbors. The appellant in the present case is made

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to contribute *pro rata* to the total expense of filling, without reference to the question whether his own lot required filling or not, or what proportion of filling was done upon it or on his account. From the statement annexed to the assessment roll, which is printed in the appellant's points, and therein stated to have been put in evidence, it appears that on some of the nineteen blocks on which filling was done there were respectively 636 yards, 1400 yards, 3983 yards and 4914 yards of filling, while on other blocks the amounts run up to 35,284, 36,765, 39,295 and 41,739 yards respectively, and yet the total amount of filling on all the blocks, aggregating 431,619 cubic yards is included in one assessment and every lot is charged with its proportion. By this means, although if the land had been so situated as to be capable of being drained, the average cost per lot of all the drain constructed would be about five dollars, the assessment upon each lot of the petitioner is \$325, and in the total assessment is included the cost of filling in seven blocks of land on which no drain whatever was built, and on which the petitioner's property was not situated. The drainage act of 1871 contains no authority for such an assessment even if the extraordinary proposition could be maintained that the filling in question was merely an incident to the construction of the drain, for the drainage act limits the area of assessment for each drain constructed, to the blocks through which it runs, consequently the petitioner's lot could not be legally assessed under that act for the construction of drains on other blocks than that on which his lot was situated, or at all events than through which the same drain ran. There is no authority for mingling in one assessment the cost of drains running between different streets, for the express provision applicable to every drain constructed under that act is that the assessment shall be upon the lands benefited "to a distance from said drain included between the adjacent streets and avenues thereto."

I can find no law under which the assessment in question can be sustained. I concur in the opinions of LAWRENCE, J.

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at Special Term, and of the General Term, that the filling in in question was not authorized by the act of 1871. There is nothing in that act which purports to transfer to the board of health the powers of the Common Council in that respect, or to change the principle of assessment for such work provided by the act of 1813. Much of the land filled in consisted of the salt marshes adjacent to the East river, for the redemption of which express provision is made in that act. But on any construction of the statute of 1871 the assessment was not laid in the manner therein prescribed.

The order should be affirmed.

All concur.

Order affirmed.

JAMES J. W. DAWLEY, Appellant, v. JOHN P. BROWN,
Respondent.

To avoid a deed for champerty under the statute (1 R. S., 739, § 147), actual, not constructive, adverse possession in another is required.

It must also appear that at the time of the delivery of the deed the lands were in the actual possession of a person claiming "under a title adverse to the grantor." It is not enough that he claims title; he must claim under some specific title, which must be disclosed, so that the court may see that it is adverse to that of the grantor in the deed assailed.

The requirement that to sustain a plea of a former action pending it must appear to the court that the first action was for the same cause as the second, is to be strictly enforced; it is not enough that the property in controversy in both actions is the same.

The rule is the same in actions of ejectment.

A judgment in ejectment is only conclusive, under the statute (2 R. S., 235, § 36), as to the title litigated and established in the action; it is not the recovery which constitutes an estoppel in a subsequent action, but the decision of the question which was in contestation between the parties. So, also, in case of a plea of a former suit pending in an action of ejectment, the point is whether the same title is sought to be litigated in both actions; if not, the former action is not a bar.

In an action of ejectment plaintiff claimed under a devise from his father, a deed from himself to C., in March, 1857, and a reconveyance from C. in July 16, 1869. It appeared that a former action was commenced by plaintiff, after his deed to C. and before the reconveyance, against

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124	387
79	390
136	574
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141	364

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defendant, one F., and others. What the original complaint was did not appear. The default of defendant and F. was entered therein July 6, 1869, and by an *ex parte* order the summons and complaint were amended by striking out the names of all the defendants therein except the defendant here and F., and by making the complaint one in ejectment, for lands including the premises claimed in this action, and judgment was thereupon entered against defendant and F. for the recovery of the said lands. A writ of possession was issued, and on the same day plaintiff went with the sheriff upon the lands, to be put in possession, when defendant and two other persons in possession of part of the lands, attorned in writing to plaintiff, and the sheriff made return that he had delivered full possession to plaintiff, which return was filed July fourteenth. On July twenty-sixth an order was made vacating and setting aside said judgment, and reinstating defendant and F. in possession. *Held*, that the deed from C. to plaintiff was not void under the statute aforesaid: 1st. As prior to its date plaintiff had been put in possession and defendant had attorned to him, which attornment was then in force; the subsequent vacation of the judgment did not relate back so as to make the deed void on the ground that defendant was then holding adversely. 2d. Because it did not appear that defendant claimed under any specific title adverse to that of C.

Defendant set up the pendency of the former action as a bar. *Held*, untenable, as at the time of bringing the former action the title was in C., and the subsequently acquired title of plaintiff from C. could not avail him in that action, it was, therefore, necessary to bring a new action to recover upon that title; that although if the plaintiff had evidence which would sustain the first action, the same evidence might entitle him to recover in the second, the evidence upon which he relied in the second would not sustain the first.

Dawley v. Brown (9 Hun, 461), reversed.

(Argued November 26, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial. (Reported below, 9 Hun, 461.)

This was an action of ejectment to recover possession of certain premises situate in Monroe county. Defendant set up as a defense a former suit pending.

The facts are sufficiently stated in the opinion.

John Van Voorhis, for appellant. The present action is not abated by the pendency of the former action. (Code, § 144, sub. 3; *Meyer v. McCollum*, 28 Barb., 230; *Barrows*

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v. *Kildred*, 4 Wall., 399; *Briggs v. Wells*, 12 Barb., 567; *Ryers v. Reppy*, 25 Wend., 432; Code, § 135, sub. 1.) The test of the identity of two causes of action is the evidence to sustain them. If the causes of action are identical the same evidence will sustain both. (*Stowell v. Chamberlain*, 60 N. Y., 272; *Rice v. Knif*, 7 J. R., 20; *Johnson v. Smith*, 8 id., 383; *Miller v. Manice*, 6 Hill, 114; *Gregory v. Burrall*, 2 Ed. Chy., 416; *Martin v. Kennedy*, 2 Bos. & Pul., 71; S. C., affd., 38 N. Y., 83; *Kitchen v. Campbell*, 37 or 13 Wils., 304; *Clegg v. Dearborn*, 12 Q. B., 576; *Crocker v. Routon*, Dudley, 254; *Hunter v. Stewart*, 31 L. I. Chy., 346; *Taylor v. Castle*, 42 Cal., 371; *Cameron v. Braine*, 45 Ala., 262; *Perry v. Foote*, 36 Conn., 102; Freeman on Judgments, § 259; *Ward v. Kelsey*, 16 Abb., 98; affd., 38 N. Y., 83; *Ritter v. Worth*, 1 N. Y. S. C. Rep., 410; *Cameron v. Braine*, 45 Ala., 262; *Barrows v. Kildred*, 4 Wall., 399; *Auburn City Bank v. Leonard*, 20 How., 193, 196; *Smith v. Britton*, 2 T. & C., 489; *Dean v. Eldridge*, 29 How., 218; *Lean v. Salter*, 4 Rob., 239; *Taffts v. Braisted*, 1 Abb., 83; *Clark v. Story*, 29 Barb., 295; *Jay v. Martin*, 2 Duer, 654; *Thurston v. King*, 1 Abb., 126; *Cameron v. Young*, 6 How., 372; *Wheeler v. Dakin*, 12 id., 537.) A plea of a former action pending as a bar cannot be used as a plea in abatement. (*Compton v. Green*, 9 How., 228; *Beels v. Cameron*, 3 How. Pr. R., 414; *Averill v. Patterson*, 10 N. Y., 500; *Fry v. Bennett*, 5 Sand., 54; *Mathews v. Beach*, 5 id., 264; *Ayers v. Covill*, 10 Barb., 260; *Hager v. Tibbets*, 2 Abb. [U. S.], 97.) Matter in abatement may now be joined in the same answer with a defense in bar, but the court must find separately upon such defenses. (*Gardiner v. Clark*, 21 N. Y., 399.) The statute as to champerty is only available to a 'person "in the actual possession" and claiming under a "title." (1 R. S. [Edm. ed.], 690, § 147.) The sheriff's return is conclusive evidence of the facts stated in it. (*Crocker on Sheriffs*, § 44; *Putnam v. Man*, 3 Wend., 202; *Allen v. Martin*, 10 id., 300; *Boomer v. Lane*, 10 id., 525; *Cal. Ins. Co. v. Force*, 8 How., 353; *Townsend v. Olin*, 5 Wend.,

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209; Watson on Sheriffs, 72; Allen on Sheriffs, 57; Bowen & Hill's Notes, 1085; *Hyskell v. Givie*, 7 Serg. & Rawle, 371; *Button v. Tracy*, 4 Conn., 79.) One who has entered by force may defend his possession by showing title. (*Hyatt v. Wood*, 4 J. R., 150; *Ives v. Ives*, 13 id., 235.) As a foundation for champerty a party must be in possession under a title, a void deed is no title. (*Crary v. Goodman*, 22 N. Y., 170; *Livingston v. Peru Iron Co.*, 9 Wend., 512, 524; *Vanderwint v. Gould*, 36 N. Y., 643; *Fish v. Fish*, 39 Barb., 513; *Crary v. Goodman*, 22 N. Y., 170; *Tyler v. Heldon*, 46 Barb., 439-465; *Webb v. Bendon*, 21 Wend., 99; *Preston v. Hunt*, 7 id., 53; *McKyring v. Bull*, 16 N. Y., 297; *Codd v. Rathbone*, 19 id., 37; *Pepper v. Haight*, 20 Barb., 429.)

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W. H. Adams, for respondent. Plaintiff was properly nonsuited on the ground of a former action pending. (65 Barb., 107; 9 Hun, 461; *Livingston v. Kane*, 3 Johns. Chy., 224; *Sawyer v. Wood*, 3 id., 416; *Groshan v. Lyon*, 16 Barb., 461; *Ogden v. Bodle*, 2 Duer, 611; *Butler v. Wehle*, 6 N. Y. Sup. Ct. Rep., 241; *Morris v. Rexford*, 18 N. Y., 552.)

RAPALLO, J. The title proved by the plaintiff on the trial of this action, was a devise from his father to the plaintiff and his brother, a quit-claim from the brother to plaintiff, a deed from plaintiff to one Culver in March, 1857, and a reconveyance from Culver to the plaintiff, dated and acknowledged on the 17th of July, 1869. This action was commenced in April, 1870.

It appeared upon the trial that before the commencement of this action, and after the conveyance from plaintiff to Culver, but before the reconveyance, the plaintiff had brought another action, against the defendant and George D. Fox and various other persons. For what cause that action was originally brought does not appear, the original complaint not being contained in the printed case on this appeal. It appears, however, from the judgment-roll in that action, which was

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put in evidence, that the plaintiff, on the 6th of July, 1869, entered the default of the defendants Brown and Fox for not appearing or answering, and obtained an *ex parte* order amending the summons and complaint by striking out the names of all the defendants except Fox, and Brown the defendant in this action, and by inserting a claim for the possession of the premises described in the complaint, without mesne profits. And by the same order it was directed that the plaintiff have judgment for the possession of the premises described in the original complaint, and adjudging that he was the owner of the same in fee simple, absolute, and with costs.

The amended complaint as contained in the judgment-roll is a simple complaint in ejectment for eighty-two acres of land. It seems to have been assumed on the trial of the present action, though the fact does not appear in any manner, that the premises claimed herein, which consist of forty-eight acres, were part of the eighty-two acres, claimed in the first action.

Pursuant to the order before mentioned judgment by default was on the 6th day of July, 1869, entered by the plaintiff against Brown and Fox for the recovery of possession of the eighty-two acres and a writ of possession was issued thereon on the same day, and on the 8th of July, 1869, the sheriff made return that he had on the 7th of July, 1869, delivered to the plaintiff full and complete possession of the real property in the writ described, which return was filed on the 14th of July, 1869.

It further appeared in evidence that on the 7th of July, 1869, the plaintiff went on the land with the sheriff, to be put in possession, and that the defendant Brown and two other persons occupying parts of the premises attorned in writing to the plaintiff.

Afterwards, on the 26th of July, 1869, an order was made vacating and setting aside the before-mentioned judgment for irregularity, and reinstating Brown and Fox in the possession of the premises. What the irregularity was, for which the judgment was vacated, is not stated in the case,

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but it may be assumed to be that the judgment had been entered in disregard of the provision that upon a default the plaintiff cannot enter judgment for any further or other relief than demanded in the complaint.

This order did not however set aside the amended complaint, nor the order allowing the amendment. It consequently left the action pending as an action by the plaintiff against Fox and Brown for the recovery of the eighty-two acres described in the amended complaint.

The defendant set up the pendency of that action as a defense to the present one. He also claimed that the deed from Culver to the plaintiff, was void for champerty, on the ground that at the time it was executed the land was held adversely by the defendant.

At the trial a nonsuit was granted solely on the ground first stated. This nonsuit was sustained by the majority of the court at the General Term on the ground that the deed from Culver was void for champerty and therefore the plaintiff could only rely on the title claimed by him in the former suit, and consequently the cause of action was the same, and also that the plaintiff had shown title out of himself by introducing the deed to Culver in evidence, and the reconveyance by Culver, being void for champerty, did not reinvest the plaintiff with the title.

We cannot concur in the view that the deed from Culver to the plaintiff was shown to be void under the statute. In the first place, at the time of its date, July seventeenth, the plaintiff had been put in possession, and the defendant had attorned to him. The judgment under which he had thus gained possession was afterwards vacated for irregularity, but there was no proof or allegation of any fraud. While thus in possession, and after the defendant had attorned to him, he obtained his deed from Culver. The subsequent vacatur of the judgment did not, we think, relate back so as to avoid this deed, on the ground that Brown was at the time holding adversely. His attornment was then in force, and the order which he subsequently obtained to re-in-

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state him in possession concedes that he was out of possession. An actual and not a constructive adverse possession is required by the statute to avoid a deed. But there is a further and conclusive answer to the defendant's claim in this respect, so far as the facts appear in the present case. To render a deed void under the statute, it must appear that at the time of the delivery thereof the lands were in the actual possession of a person claiming "under a title adverse to that of the grantor." It must therefore be shown under what title the person in possession claims. It is not enough that he claims title. He must claim under some specific title. What the title is must be disclosed, that the court may see that it is adverse to that of the grantor in the deed assailed. (*Crary v. Goodman*, 22 N. Y., 170.) Now there is nothing in this case to show that Brown claimed any title adverse to that of Culver, the grantor of the plaintiff. The only evidence on the subject is the testimony of the plaintiff, who states that he was in possession until about 1860; that one Sage then took possession, and that after him Brown came into possession. It does not appear that Brown had any color of title, or that he claimed any specific title, and indeed I do not find proof of any claim of title whatever on the part of Brown. For all that appears he had a mere naked possession, and the presumption would be that he held under Culver, who was apparently the owner of the legal title. The evidence discloses no ground for assailing the deed from Culver to the plaintiff on the ground of champerty.

As the case stood when the nonsuit was granted, the plaintiff had no title to the premises in dispute at the time of bringing the first action, the title being then in Culver, but he had afterwards obtained title from Culver. This subsequently acquired title would not have availed him in the first action, for the issue there was whether he was entitled to the land at the time the action was commenced. He must necessarily bring a new action, in order to recover upon the title obtained from Culver. Aside from some technical

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points raised by the appellant, as to which we concur in the opinion at General Term, the only important question in the case is whether the pendency of the first action is, under the circumstances, a defense to the second, and this question is not free from difficulty.

It is very clear that a judgment in favor of the defendant in the first action would not have been a bar to the second. (*Barrows v. Kindred*, 4 Wall., 399.) But if the first had resulted in a judgment for the plaintiff on the ground of some title different from that set up in the second, the defendant should not have been subjected to the expense and vexation of litigating two actions, by the same party against him, for the recovery of the same land. Still the rule of law is that the pendency of a former action does not abate a second, unless both actions be for the same cause (Code, § 144; New Code, §§ 488, 498), and the difficulty lies in determining whether the defense here interposed meets that requirement. The test generally applied to determine the identity of causes of action is whether the same evidence would support both actions. (*Stowell v. Chamberlain*, 60 N. Y., 272, and cases cited.) It is also held in that case, that to make a judgment in a former action a bar, the circumstances must be such that the plaintiff might have recovered in the first action for the same cause alleged in the second.

If the controlling test is whether the same evidence will support both actions the defense must fail, for it is apparent that although, if the plaintiff had evidence which would sustain the first action, the same evidence might entitle him to recover in the second, yet the evidence upon which he relied in the second action would not have sustained the first. It appears affirmatively in the present action that the title was out of the plaintiff when the former action was brought. In *Barrows v. Kindred* (4 Wall., 399), where a former judgment against the plaintiff in an action of ejectment was set up as a bar to a second action by the same plaintiff to recover the same property, (the statute of Illinois being similar to that of this State as to the conclusiveness of

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a judgment in ejectment on the question of title) the court conceded that the former judgment was conclusive as to the want of title of the plaintiff at the time of the first action, and was a bar to a second action attempted to be maintained on the same state of facts; but that that did not deprive the plaintiff of the right to acquire a new and distinct title, and having done so he had the same right to assert it without prejudice from the former suit, which would have accompanied the title in the hands of a stranger, and that such subsequently acquired title was not involved in or in any way affected by the prior litigation. Under the statute of this State a judgment in ejectment is conclusive only as to the title established in the action. (2 R. S., 235, § 36; *Ryerss v. Rippey*, 25 Wend., 432.) And it may be shown by parol on what title it was rendered. (*Briggs v. Wells*, 12 Barb., 567.) And a subsequently acquired title may be thus shown as against a former adjudication. (*Burt v. Sternburgh*, 4 Cow., 559.) The title referred to in the statute, as to which the judgment is conclusive, is that which was actually litigated and adjudicated. (Tyler on Ejectment, 632.) It is not the former recovery which constitutes the estoppel. It is the decision of the question which was in contestation between the parties, and the estoppel rests, in ejectment as well as in other cases, upon the familiar principle that when the same point has been litigated between the same parties, and decided by a court of competent jurisdiction, it cannot be again called in question. (*Bank v. Bridges*, 11 Rich. [S. C.], 87.) The same principles apply to defenses as to the plaintiff's title, and a former judgment does not deprive the defendant of the right to set up a subsequently acquired title as a defense. (*Mann v. Rogers*, 35 Cal., 316.)

To sustain a plea of a former action pending, it is conceded that it must appear to the court that the first action is for the same cause as the second. This requirement is strictly enforced. It is not enough that the property in controversy in both actions is the same. (*Storvell v. Chamberlain*, 60 N.Y., 272.) In *Kelsey v. Ward* (16 Abb. Pr., 98, 103, affirmed

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38 N. Y., 83), it was held at General Term, by a very able bench, BROWN, LOTT and SCRUGHAN, that the pendency of actions for rent, alleged to be payable quarterly, was no defense to an action for the same rent under a claim that it was payable at the end of the year.

As has already been shown in the present case, the allegation that the cause of action was the same in both actions will not stand either of the tests ordinarily applied. A judgment for the defendant in the first would not bar the second. The evidence to sustain the second would not sustain the first, and the title in issue in the second must be different from that sought to be established in the first, because in the second action the plaintiff's chain of title shows title out of himself at the time the first was brought. There is no English authority precisely in point, for a very good reason, viz. : that as the action of ejectment at common law determined no question of title, but was only possessory, a former judgment or action could not be pleaded. But much light is thrown upon the point by reference to the practice of the courts of England in cases like the present. It was held at a very early day (1738) by the Court of King's Bench, in *Thrustout v. Troublesome* (Andrews Rep., 297), that where, during the pendency of an action of ejectment, the plaintiff brought a second action for the same lands *on the same title*, the court would stay the proceedings in the second action till the first was discontinued and the costs paid. This decision has been followed in later cases, and where judgment has been rendered for the defendant in the first action, the second will be stayed until the costs of the first are paid, provided it appears that the second action turns upon the same question of title which was determined in the first (as the validity of the same will), though the second action affect different property. But whether the case be one of a former judgment, or former action pending, the material point is whether the *same title* is sought to be litigated in both actions. (*Doe v. Bather*, 12 Adol. & Ell. [N. S.], [12 Q. B.], 941; *Haigh v. Paris*, 16 M. & W., 145.) Unless the same

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title is involved in both actions the relief will be refused. In *Doe v. Gustard* (5 Scott N. R., 818), in an action of ejectment for forfeiture for non-payment of rent, an application for a stay was made on the ground that another action previously brought in respect of a former forfeiture of the same property under the same lease was pending. The application was denied on the ground that both actions were not founded on the same title (as in the case in *Andrews Reports*), and that the rule on which the motion was founded applied only when the two actions were for the same identical cause.

We think the plea of former action pending should be governed by the same principles as those upon which these motions for a stay were decided. An application of these principles leads to a reversal of the judgments below.

The judgments of the General Term and on the nonsuit should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgments reversed.

ELEANOR TERRITT, Respondent, v. RANDALL G. COWENHOVEN, Appellant.

In an action of ejectment, plaintiff claimed under a sheriff's deed on sale on execution against T., who then owned the legal title. Summary proceedings were instituted to remove T. and defendant, which resulted in an adjudication in favor of the judgment-creditor, and a warrant of removal was issued. T. thereupon took a lease of the premises, and defendant executed a contract, whereby he agreed not to take any advantage of the possession of T. under the lease, until the proceedings were reversed. The judgment-creditor in consequence refrained from executing his warrant. *Held*, that while occupying this position the defendant, as well as T., was estopped from denying plaintiff's title.

(Submitted December 1, 1879 ; decided January 18, 1880.)

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APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment of the City Court of Brooklyn.*

This case was removed into the Supreme Court by reason of the incompetency to sit of a majority of the judges of the General Term of the city court.

This was an action of ejectment.

At and prior to July 12, 1853, the premises in question were owned in fee by Tunis T. Cowenhoven. On that day a judgment, by confession, was entered against him in favor of one Territt. An execution was issued thereon, under which the premises in question were sold to one Hart, who assigned his certificate of sale to James Crombie, who received the sheriff's deed November 8, 1857. On March 20, 1858, Crombie instituted summary proceedings under the statute before the county judge of Kings county against said Tunis T. Cowenhoven and the defendant herein. The proceedings resulted in a decision in favor of Crombie, and a warrant of removal was issued. This warrant was not executed for the reason that Tunis T. Cowenhoven took a lease for the premises from Crombie, and the defendant, at the same time, signed a written instrument by which he agreed with Crombie that he would, in no way, take advantage of the possession of his father under that lease, and would not interfere with the premises until the summary proceedings to obtain the possession of the premises should be reversed. The plaintiff has succeeded to the title and rights of James Crombie. Defendant proved that Tunis T. Cowenhoven executed to him a written contract, agreeing to convey the premises, dated April 5, 1857, and afterwards executed to him a deed dated October 9, 1855, recorded November 5, 1857.

J. Voorhees, for appellant. The sale on execution against T. T. Cowenhoven would not affect defendant's title. (*Smith*

* This case is reported below, 11 Hun, 820; after that decision a re-argument was ordered, and upon such re-argument the judgment was affirmed by the General Term.

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v. *Gage*, 41 Barb., 61; *Hathaway v. Page*, 34 N. Y., 103.) Defendant is not estopped by the summary proceedings in 1858. (*Brown v. Betts*, 13 Wend., 29.) Defendant's agreement not to take any advantage of T. T. Cowenhoven's possession under the lease until the proceedings were reversed, did not amount to an equitable estoppel. (*Davis v. Tyler*, 18 J. R., 490.)

D. P. Barnard, for respondent. A judgment or decree of a court of competent jurists is final, not only as to the matters actually determined, but as to every other matter which the parties might have litigated and had decided. (*La Guen v. Gouverneur*, 1 Johns. Cas., 436; *Brown v. Horne*, 2 Barb., 586; *Southgate v. Montgomery*, 1 Paige, 41; *Gletson v. Hoyt*, 1 Johns. Chy., 543; *Gordon v. Buckbet*, 3 Cow., 120; *Burt v. Steinburgh*, 4 id., 559; *Wood v. Jackson*, 8 Wend., 9; *Lawrence v. Hunt*, 10 id., 81; *Calkins v. Allerton*, 3 Barb., 175; *Dunckle v. Wiles*, 6 Barb., 575; S. C., 1 Kern., 420; *Baker v. Rand*, 13 Barb., 152; *Buckhead v. Brown*, 5 Sandf. [S. C.], 134; *Kingsland v. Spalding*, 3 Barb. Chy., 341; *Miller v. Manice*, 6 Hill, 114; *Doty v. Brown*, 4 Cow., 71; *White v. Coastsworth*, 2 Seld., 137; *Castle v. Noyes*, 4 Kern., 329; *Lansing v. Russell*, 13 Barb., 510; *Barbours v. Van Zandt*, 3 Seld., 523; *Embury v. Conner*, 3 Coms., 522; *Mercier v. The People*, 25 Wend., 64; *Van Wormer v. Mayor of Albany*, 15 id., 262; *Harris v. Harris*, 36 Barb., 88; *Hayes v. Reese*, 34 id., 151; *Hyatt v. Bates*, 3 id., 308; S. C., 40 N. Y., 164; *Demorest v. Darg*, 32 id., 281; *Kelsey v. Ward*, 16 Abb. P. R., 98; *Smith v. Hemstreet*, 54 N. Y., 644; *Gates v. Preston*, 41 id., 113; *Brown v. Mayor of N. Y.*, 66 id., 385.) Defendant was as much estopped by his agreement that the premises should be leased, and that he would not take advantage of the possession given by said lease or interfere with the premises until the summary proceedings were reversed, as his father would have been. (*Ackley v. Dygert*, 33 Barb., 176; *Coleman v. Bearn*, 14 Abb. P. R., 38; *Brown v. Bowen*, 30 N.

Opinion *per Curiam*.

Y., 519; *Manufacturers' Bank v. Hazard*, 30 id., 226; *Bigler v. Furman*, 58 Barb., 545; *Remsen v. Graves*, 41 N. Y., 471; *Tompkins v. Snow*, 63 Barb., 525; *Prevot v. Lawrence*, 51 N. Y., 219.)

Per Curiam. The proceedings before the county judge to remove Tunis T. Cowenhoven and the defendant, from the possession of the premises resulted in an adjudication in favor of the judgment-creditor, and the issuing of a warrant of removal. Upon presenting this warrant for execution Tunis T. Cowenhoven took a lease of the premises, and the defendant Randall G. Cowenhoven, executed a contract whereby he agreed not to take any advantage of the possession of Tunis under said lease, and not to interfere with the premises until the proceedings before the county judge were reversed, whereupon the judgment-creditor refrained from executing the warrant. While occupying this position we think that the defendant, as well as Tunis Cowenhoven, was estopped from denying the title of the plaintiff in those proceedings. If the proceedings before the county judge should be reversed, they would not of course affect the rights of the defendant, or if Tunis and the defendant should quit the possession of the premises, the defendant would then be at liberty to assert any right which he had superior to the rights of the judgment-creditor. The facts are somewhat complicated. The deed to the defendant was subsequent to the judgment under which the plaintiff claims, but if that deed was executed in pursuance of an executory contract of sale, prior to the judgment, and especially if the defendant was in possession under such contract, the defendant's rights would be superior to those of the judgment-creditor. We do not deem it necessary to determine what effect, if any, the adjudication before the county judge would have upon this equitable right. All that we intend to decide is, that the defendant, while occupying the position he did, and while Tunis occupied the premises under the lease, was estopped

Statement of case.

from denying the title of the plaintiff, who succeeded to the rights of the judgment-creditor.

The judgment should be affirmed.

All concur.

Judgment affirmed.

**CORNELIA LOSEE et al., Executors, etc., Appellants, v.
DANIEL A. BULLARD, Impleaded, etc., Respondent.**

Where a trustee of a manufacturing corporation has become liable for a debt of the corporation, because of failure to make and file an annual statement as required by the statute (§ 12, chap. 40, Laws of 1848), the statute of limitations then begins to run as to that debt, and the right of action is barred in three years thereafter, although the default is continued during successive years; the continuance of the default does not revive the liability or create a new one.

Boughton v. Otis (21 N. Y., 264), distinguished.

A technical dissolution of such a corporation is not necessary to relieve a trustee from the consequences of not filing an annual statement thereafter; it is sufficient if the organization has been practically abandoned.

A judgment was obtained against a manufacturing corporation in 1867; no annual statement was thereafter filed. The company was organized in 1863, with three trustees; no officers were thereafter elected; it ceased to do business in 1865. In 1870 two of the three trustees sold out their stock to their co-trustee and never afterwards acted, the third trustee was, from the time of the purchase, the sole stockholder. The only act done by him thereafter was the payment of a debt of the corporation incurred in 1865. This action was brought in June, 1875. *Held*, that the corporation was practically abandoned, and the statutory requirement as to filing reports had no application to it; that even if successive defaults could continue or renew the liability, no default was shown to have been committed within three years before the commencement of this action.

Sanborn v. Lefferts (58 N. Y., 179), distinguished.

(Argued December 5, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was brought against defendants as trustees of the Saratoga Paper Company, to recover the amount of a judg-

79 404
130 370

79 404
134 286

79 404
156 557
156 560

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164 232

79 404
170 1478
171 1191

Statement of case.

ment obtained by Henry Losee, plaintiffs' testator, against said company, on the ground of alleged failure on the part of defendants, as trustees, to make and file the annual statements required by the general manufacturing act (§ 12, chap. 40, Laws of 1848).

The judgment against the company was recovered in 1867, it was for injuries sustained by said Losee by means of the explosion of a boiler belonging to the company.

The further facts appear in the opinion.

A. Pond, for appellants. It was error to hold that the plaintiffs' claim was barred by the statute of limitations. (3 R. S. at Large, 735, § 12; Laws 1848, chap. 40, p. 57, § 12; *Whitney v. Barlow*, 62 N. Y., 62; *Jones v. Barlow*, id., 202, 206; *Boughton v. Otis*, 21 id., 261, 264; *Shaler Co. v. Bliss*, 27 id., 297; *Nimmons v. Tappan*, 2 Swce., 652.) The corporation could only be relieved of the duty to make and file its annual report by a regular judicial dissolution of it. (*Sanborn v. Lefferts*, 58 N. Y., 179; *Denning v. Puleston*, 55 id., 655; 3 J. & S., 309; *Carey v. Schoharie*, 4 N. Y. [S. C.], 285; *Willett v. White*, 25 N. Y., 581; *Nimmons v. Tappan*, 2 Swce., 652, 659; *Reed v. Keese*, 60 N. Y., 616; 5 J. & S., 269.)

E. F. Bullard, for respondent. This action was barred by the three years statute of limitations. (*Merchants' Bank v. Bliss*, 35 N. Y., 412; *Boughton v. Otis*, 21 id., 262; 62 id., 202; *Cameron v. Seaman*, 69 id., 396.) A judgment against the corporation is not evidence against the trustees. (*Miller v. White*, 50 N. Y., 137; *Adams v. Mills*, 60 id., 533; *Jones v. Barlow*, 62 id., 202.) Upon the sale by E. F. Bullard and Buchanan of their stock in May, 1870, they ceased to be trustees or officers of the corporation and were no longer liable. (*Sturges v. Vanderbilt*, 73 N. Y., 384; 3 R. S., 733, § 3; 50 N. Y., 137; A. & A. on Corps., 108, § 14; id., 736, § 3.) The corporation was practically dissolved by suspending its ordinary business in January, 1865,

and failing to resume within one year thereafter. (3 R. S., 463, § 38; *Slee v. Bloom*, 19 J. R., 476; Laws 1811, chap. 67, § 2, 7; *Bradt v. Benedict*, 17 N. Y., 96; *Huguenot Nat. Bank v. Studwell*, 7 N. Y. Weekly Dig., 448; 74 N. Y., 621.)

RAPALLO, J. If the respondent ever became liable for the amount recovered by the plaintiffs' testator against the Saratoga Paper Company, such liability accrued and was complete at least as early as the year 1868, the judgment having been recovered in April, 1867, and the statement required by the statute not having been filed in January, 1868. Assuming that this judgment then was an existing debt of the company, for which the omission to file the statement rendered the respondent liable, this action should have been brought within three years from the time the cause of action against him accrued. (*Merchants' Bank v. Bliss*, 35 N. Y., 412.) It was not brought until June 5, 1875, and was at that time clearly barred by the statute.

The appellants claim that the failure to file the certificate in each year after 1868, created a new liability on the part of the defendant, and that consequently the default in 1873 and the subsequent years can be resorted to for the purpose of maintaining this action and avoiding the effect of the statute of limitations. We think this position untenable, for two reasons. In the first place the statute requires that the action be brought within three years from the time the cause of action accrued. The action was for a statutory penalty: This penalty, if it ever was incurred, was completely incurred in 1868, and the testator of the plaintiffs could then have brought his action therefor. We do not think that the continuance of the default in successive years had the effect of renewing the liability of the respondent, as would a new promise or a payment on account, in the case of a liability founded on contract. The remarks of COMSTOCK, J., in *Boughton v. Otis* (21 N. Y., 264), are not applicable to this case. They relate to the liability of successive trustees, for the same debts, not of the same trustee for the same debt

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by reason of successive defaults. They do not affect the question whether a trustee having once become liable for a particular debt, the statute of limitations begins to run in his favor from that time as to that debt, notwithstanding that the default may be continued during successive years.

We are also of opinion, however, that even if successive defaults could continue or renew the liability, no default was shown to have been committed by the respondent within three years before the commencement of this action. The latest default alleged, of which the appellants could on any theory avail themselves, was the omission to file the statement in January, 1873, this action not having been brought until June 5, 1875. It appears from the findings that the corporation ceased to do business in 1865, and that it contracted no debts after that time. That from and after January 20, 1865, it suspended its ordinary business and never has resumed it, the only act shown to have been done being the payment by the respondent, in 1872, of one debt of the company incurred prior to 1865, and on which an action was pending. That in May, 1870, the defendants Edward F. Bullard and Coe S. Buchanan, who were the co-trustees of the company under the original articles of association, sold all their stock to the respondent, D. A. Bullard, and never afterwards acted as trustees, and that from that date the respondent, D. A. Bullard, was the only stockholder. It does not appear that there ever was any election of officers or trustees after 1863 when the company was organized and Buchanan was elected president; and it is found that no president was ever afterwards elected. Under these circumstances we think the corporation was practically abandoned and broken up, if not technically dissolved, and that the statutory requirement had no application to it. It had not only ceased business, but was incapable of transacting any. It had no trustees or officers who could manage its affairs, or make the required statement. All its powers were suspended, if not finally extinguished. It would, we think, be a perversion of the intent of the statute in question to visit its penalty upon a

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party upon the ground that he had been a trustee of a corporation thus situated. As said by SPENCER, J., in *Slee v. Bloom* (19 J. R., 476), for all the substantial purposes of justice, and in effect, the corporation was dissolved. A technical dissolution is not necessary to relieve trustees from the consequences of not filing an annual statement. In *Huguenot N. Bank v. Studwell* (74 N. Y., 621), it was held that on the appointment of a receiver, without a final decree of dissolution, the corporation was so far dissolved that thereafter there was no duty upon the trustees to make the annual report. In *Sanborn v. Lefferts* (58 N. Y., 179), the corporation had not, at the time of the default, even suspended its ordinary business for one year; the defendant held over and acted as trustee until after the time the annual statement should have been filed, and the action was brought within three years after the first default.

The points discussed are quite sufficient to sustain the judgment without reference to the question whether the plaintiff's testator was a creditor, for whose claim a trustee could be liable under the statute, or to the point that the judgment against the corporation was not evidence of its indebtedness, as against the trustees.

By placing our decision upon all the facts appearing in the case we do not intend to intimate that the omission to file the statement in 1868 after the corporation had discontinued business for three years rendered the defendant liable.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

J. PHILIP WEYER et al., Appellants, v. WILLIAM BEACH,
owner, impleaded, etc., Respondent.

79	409
f163	507

Under the Code of Civil Procedure (§ 1338), where an order of General Term, reversing a judgment entered upon the report of a referee, does not state that it was made on questions of fact, it will be deemed to have been made on questions of law only.

Where, in a proceeding under the general lien law (chap. 402, Laws of 1854, as amended by chap. 558, Laws of 1869, and chap. 489, Laws of 1873), to foreclose an alleged mechanic's lien, it appears that no lien ever existed, a personal judgment cannot be rendered against the owner of the premises upon an independent contract between him and the claimant.

The proceeding being statutory can only be resorted to in a case falling within the statute, *i. e.*, where a mechanic's lien exists. The power to render a personal judgment is merely incidental to the main purpose, and where it appears that no lien ever existed, the whole proceeding falls.

Glacius v. Black, (67 N. Y., 563; S. C., 50 id., 145), distinguished.

As to whether, under said act, any personal judgment can be rendered except for a deficiency, *quære*.

(Argued December 5, 1879; decided January 13, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, reversing a judgment in favor of plaintiffs against defendant Beach, and granting a new trial as to him. (Reported below, 14 Hun, 231.)

These were proceedings under the general lien law to foreclose an alleged mechanic's lien upon certain premises owned by Beach.

The facts appear sufficiently in the opinion.

Erastus P. Hart, for appellants. The personal judgment awarded and entered was warranted by the facts found and authorized by the statute. (*Leonard v. Vredenburg*, 8 J. R., 29; 4 Cow., 432; 2 N. Y. 225-229; 21 id., 412, 419, 420, 427, 433, 487; 5 Wend., 235; 55 N. Y., 651; Laws 1854, chap. 402, p. 1086; Laws 1860, chap. 558; Laws 1873, chap.

Statement of case.

489, p. 743; *Glacius v. Black*, 50 N. Y., 145, 153, 154; 67 id., 563-565; 11 Hun, 91; 50 N. Y., 154; *Grant v. Vandercook*, 57 Barb., 165; *Maltby v. Greene*, 1 Keys, 548-552; *Freeman v. Crane*, 3 N. Y., 305-308; *Hubbell v. Schreyver*, 56 id., 604, 605; 15 Abb. [N. S.], 300, 306; *Danow v. Morgan*, 65 N. Y., 333; *Hallahan v. Hubert*, 57 id., 409, 416-417.)

David B. Hill, for respondent. It was error to permit a recovery upon the cause of action arising upon the alleged parol promise, because such claim was improperly joined in this proceeding. (Laws 1873, chap. 489; *Benton v. Wichwire*, 54 N. Y., 226; *Murhlitt v. Silverman*, 50 id., 360; *Grant v. Vandercook*, 57 Barb., 165; *Burroughs v. Tostevan*, 75 N. Y., 567; *Dowdney v. McCullum*, 59 N. Y., 367; *Wilson v. Palmer*, 11 Hun, 325; Code Civil Procedure, § 167; *Leary v. Gardner*, 63 N. Y., 624; *Kelsey v. Rourke*, 50 How., 315; *Hallahan v. Herbert*, 57 N. Y., 409.) The referee erred in receiving in evidence entries in plaintiffs' books made in the absence of defendant Beach. (*Meacham v. Pell*, 51 Barb., 65; *Peck v. Von Kellee*, 19 Alb. L. J., 201; *Vosburgh v. Thayer*, 12 J. R., 461; *Tomlinson v. Borst*, 30 Barb., 42; *Eber v. Lorillard*, 19 N. Y., 229; *Green v. H. R. R. R. Co.*, 32 Barb., 34; *Worrall v. Parmelee*, 1 N. Y., 519; *O' Sullivan v. Roberts*, 39 Supr. C. R., 360; *Clark v. Crandall*, 3 Barb., 612.) The plaintiffs acquired no lien. (*Cheney v. Troy Hospital Association*, 65 N. Y. R., 282; *Prensser v. Florence*, 51 How., 385; *Thompson v. Yates*, 28 id., 142; *Smith v. Coe*, 2 Hilton, 365; *Schenider v. Hobern*, 41 How., 233; *Crane v. Genin*, 60 N. Y. R., 131; *Haswell v. Goodchild*, 12 Wend., 373; *Cox v. Broderick*, 4 E. D. Smith, 721; *Bailey v. Johnson*, 1 Daly, 61; *Smith v. Brady*, 17 N. Y. R., 173; *Cunningham v. Jones*, 20 id., 486; *Crane v. Genin*, 60 id., 127; *McMillin Seneca Lake Co.*, 5 Hun. 12; *Lumbard v. Syracuse R. R. Co.*, 55 N. Y. R., 491; *Ferguson v. Burk*, 4 E. D. Smith, 760; *Linn v. O'Hara*, 2 E. D. Smith, 560.)

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RAPALLO, J. The referee found that at the times of the filing of the notices of lien by the several claimants in this proceeding, nothing was due from the respondent to Stone & Bassett the contractors to whom the materials and labor of said several claimants were furnished, and that nothing afterwards became due to said contractors. Also that none of the payments which had been made by the respondent to the contractors were made by collusion, for the purpose of avoiding or with intent to avoid the provisions of the statute in relation to mechanics' liens. Upon these findings the conclusion necessarily followed that none of the claimants ever acquired any lien upon the premises in question, and that the proceeding to enforce the alleged liens was without foundation.

The referee so decided, but he rendered a personal judgment against Beach the owner and respondent, upon a verbal agreement found to have been made by him with the claimants Weyer & Waltzer that he Beach would keep back from the payments which should be coming to the contractors under the contract, enough to pay to those claimants what sums the contractors might owe them for brick delivered, if notified or posted in respect thereto by such claimants, which agreement the referee found to have been broken by the respondent.

In the opinion at General Term the reversal of the judgment was placed upon two grounds, one of which was that they disagreed with the referee as to the facts, and were of opinion that the evidence established an agreement by the respondent to become surety for the contractors for such sums as they might owe the claimants for brick furnished, and that his undertaking not being in writing was void by the statute of frauds. The order of reversal, however, does not state that it was made on questions of fact, and it must therefore, pursuant to section 1338 of the Code, be deemed to have made, not on any question of fact, but on questions of law only. The respondent cannot therefore avail himself of the view of the facts taken by the court at General Term

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but must abide by the findings of the referee, they having some evidence to support them.

The other ground of reversal was that the claimants having failed to make out that any lien ever existed, the whole proceeding must fall and no personal judgment could be rendered therein.

This point has several times been decided by this court. The proceeding is statutory and can only be resorted to in a case falling within the statute, that is, where a mechanics' lien exists. The main object of the proceeding is to enforce the lien, and the power to render a personal judgment is merely incidental to the main purpose, and to avoid the necessity of resorting to a separate action. But where no lien exists, this form of proceeding cannot be resorted to for the purpose of enforcing a mere personal contract between parties, and the unfounded allegation of the existence of the lien does not authorize the substitution of this proceeding in place of the proper common law action. If it did, all demands on contracts relating to building, and many others, might be enforced by proceedings under the statute, by simply making the false allegation that a lien had been acquired. In *Burroughs v. Tostevan* (75 N. Y., 567), decided January, 1879, it was held that even where the alleged lien was sought to be enforced by action, pursuant to the statute in force in Kings county, a personal judgment could not be rendered if no lien was established.

In *Glacius v. Black* (67 N. Y., 563; 50 id., 145) the case arose under the Kings county act, which expressly authorized a personal judgment, and the court had acquired jurisdiction of the proceeding, because a lien in fact existed when it was instituted, but expired by lapse of time during its pendency. But in no case has it been held that where no lien ever existed the proceeding can be entertained for the mere purpose of enforcing a personal contract.

The counsel for the appellants claims that the decision of the referee that the claimants did not acquire a lien is open for review here. Though both parties appealed to the Gen-

Opinion of the Court, per RAPALLO, J.

eral Term from the judgment entered on the report of the referee, it was reversed only on the appeal of the respondent Beach. It does not appear that any disposition was made of the claimants' appeal. If they desired to litigate again the question of lien, they should have gone to a new trial instead of appealing from the order. We see no error however in the decision of the referee on the question of lien.

The main contention of the counsel for the appellants is that the amendments of 1873 (Laws of 1873, chap. 489), to the lien law of 1854, enlarge the powers of the court in such cases so as to authorize a personal judgment though no lien be established.

It is to be observed that the general lien law of 1854 and 1869, under which the proceeding in this case was instituted (unlike the local lien laws which have been before us in other cases), contains no express authority for the rendition of any personal judgment. The authority to commence an action by the service of a notice of the facts constituting the claim is confined in express terms to an action to enforce the lien created by the filing and docketing of notice of claim in the county clerk's office, and the same language is preserved unchanged in the amendments of 1873. But in those amendments a provision is added (§ 24) which enacts that the court shall have power "to direct that judgment be entered for any deficiency remaining after the enforcement of the judgment originally rendered against the owner or other party interested in said premises affected thereby; and may issue execution against other property, real or personal, of such owner or party interested as aforesaid." This is the only express power contained in either act to render a personal judgment, and the language of the provision clearly indicates that it was not intended that the proceedings should affect any property other than that upon which a lien should be established, except in case of the insufficiency of that property to satisfy the lien.

The counsel however seeks to imply such a power from other provisions in the amendments, viz.: Section six pro-

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vides that the Supreme Court or County Court shall have power to adjust and enforce all the rights and equities between all or any of the parties, and enforce and protect the same by any of the remedies usual in said courts. Section eleven of both acts provides that upon default in answering, the amount of the claim shall be assessed and judgment shall be entered establishing the amount of the lien and costs, and execution shall thereon issue in the same manner as on other judgments, except that it shall direct the sale of the interest which the owner had in the premises at the time of the filing of the lien. Section fourteen of the act of 1854 provides that if judgment shall be for the claimant after trial, it shall be enforced as provided in section eleven, while section fourteen of the act of 1873 provides that it shall be enforced as provided in "this act." This change is not we think sufficient, nor was it intended, to enlarge the power of the court in rendering judgment, but relates to the manner of enforcing such judgments as the court is under the act authorized to render, viz. : Judgments for the enforcement of the lien and for a deficiency, and for costs against either party. The same remark applies to the provisions in the amended act authorizing the docketing of judgments rendered under the act, as in the case of other money judgments.

The power to render a personal judgment is even more restricted in the act of 1854, as amended in 1873, than it is in the local acts upon which our former decisions were based; and we entertain some doubt whether under this act any personal judgment can be rendered, except for a deficiency. If the plaintiffs have a valid claim upon their alleged agreement with the defendant, they can enforce it in a proper action, and these proceedings will be no bar to such an action, as the claim could not be recovered herein and is rejected for that reason, and not upon its own merits.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

WILLIAM C. CHURCH, as Administrator, etc., Appellant, v.
 SETH HOWARD, impleaded, etc., Respondent.

79	415
113	72
79	415
124	492

The declarations of a sole administrator or executor, made, when not acting in the discharge of his duties, to third parties having no interest in or connection with a claim belonging to the estate, are not evidence against him in an action brought by him in his representative capacity upon such claim.

In an action, by an administrator, upon a promissory note, signed by H. as surety, the defense was that the note had been altered, without defendant's consent. A witness called for the defense was asked to state a conversation between her and plaintiff, after the death of the intestate, in relation to the note. This was objected to on the ground that the declarations of the administrator were not evidence against the payee of the note. The objection was overruled, and the witness answered, in substance, that plaintiff stated he erased a clause in the note, at the request of the deceased. Plaintiff was not, at the time of the conversation, doing any business in connection with the estate, and the witness had no connection with or interest in the note. *Held*, error; and that the objection was sufficient to present the point as to the competency of such admissions.

F., the maker of the note for whom H. signed as surety, who was a party defendant, but who did not answer, as a witness for the defense, was permitted to testify to personal transactions between himself and the intestate. *Held*, error, that the witness was "a person interested in the event," within the meaning of section 829 of the Code of Civil Procedure, and was, therefore, incompetent; also, *held*, that the fact that plaintiff subsequently testified as to the facts sworn to by F. did not cure the error.

Where an objection to evidence has once been made and overruled, it is not required to repeat the objection, where subsequent questions call for the same class of evidence, relating to the same subject matter.

Another defense was the statute of limitations. H., as a witness in his own behalf, was asked whether he had any interest in the note, or derived any benefit from it. This was objected to on the ground of the incompetency of the witness under said section. The objection was overruled. H. answered that he had not; that he was an accommodation maker, and had never paid any interest on the note, or authorized or directed it to be paid, or knew that any had been paid. *Held*, error, that the whole testimony was responsive to the questions put, and all of it was incompetent.

H. was permitted to testify, under objection, that F. told him his name had been taken off the note, and that the intestate said she would see his name was taken off. *Held*, error.

So, also, *held*, as to evidence of H. to the effect that he did not suppose

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he was on the note, and that if he had known it he could have obtained security from F. before his failure.

Also *held*, that the fact that the case was submitted to the jury on the sole question as to the alteration of the note, did not remedy the error.

Church v. Howard (17 Hun, 5), reversed.

(Argued December 5, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 17 Hun, 5.)

This action was brought by plaintiff as administrator of the estate of Mary M. Church, deceased, upon a promissory note, executed by defendants, which, in its original form, was as follows :

“ \$2,000. Two years from date I promise to pay Mary M. Church, or bearer, two thousand dollars, with interest semi-annually, at seven per cent, in gold or its equivalent. Value received.

“ EATON, *January* 18, 1870.

“ A. G. FARGO,

“ SETH HOWARD, *Surety*.”

Defendant Howard alone answered, alleging the alteration of the note, without his knowledge or consent, by the erasure of the words, “ in gold or its equivalent.” He also pleaded the statute of limitations.

The facts, so far as pertinent to the questions discussed, appear sufficiently in the opinion.

S. D. White, for appellant. The note in suit was not outlawed as to Howard. (Old Code, § 102; New Code, § 402.) The court erred in receiving the declarations of plaintiff as to the erasure. (5 Barb., 406–407; 19 *id.*, 310; *Thompson v. Peters*, 12 Wheat., 565; 1 Phil. on Ev. [Edward's ed.], 483; *id.*, 481, note 133; *White v. Miller*, 71 N. Y., 118; 34 Barb., 539, 544.) Fargo was not a competent witness to testify as to what he did. (8 Hun, 127;

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13 id., 13, 14; 62 N. Y., 80; 1 Kent, 517-518; 32 Barb., 250.) The court erred in receiving the testimony of defendant Howard as to personal transactions with plaintiff's intestate. (New Code, § 829; 17 Hun, 470-472; 46 Barb., 30; 48 id., 190; 12 Hun, 179; 69 N. Y., 404; id., 257-260; 64 id., 457; 66 id., 433; 68 id., 419.) It was error to allow Howard to testify as to what Fargo told him about his name being stricken off the note and this error was not cured although the case was given to the jury upon the sole question of alteration. (5 Den., 81; 19 N. Y., 299; 3 Keyes, 497-499; 52 Barb., 365; 55 N. Y., 400, 408; 3 Hun, 70; 11 id., 82, 87, 88.) The note was properly received in evidence without first explaining the erasure. (*Maylue v. Sniffin*, 2 E. D. Smith, 1.)

A. N. Sheldon, for respondent. Fargo was a competent witness. (Code of Civil Procedure, § 829; 2 Wait's Pr., 449; *Comstock v. Hier*, 73 N. Y., 269; *Synonds v. Peck*, 10 How. Pr., 395; 70 N. Y., 385; 5 Hun, 536; *Allis v. Stafford*, 14 Hun, 418; *Murkell v. Benson*, 55 How. Pr., 360; *Wetmore v. Peck*, 19 Alb. L. J., 400; *Marpass v. Gilman*, 16 Hun, 121; *Church v. Howard*, 17 id., 5; *Hobart v. Hobart*, 62 N. Y., 80; *Crary v. White*, 59 id., 336; *Simmons v. Sisson*, 26 id., 264; *Lobdell v. Lobdell*, 36 id., 333.) There was no error in receiving the evidence given by defendant Howard. (*Paige v. Fazackerly*, 36 Barb., 392; *Smith v. Hill*, 22 id., 656; *People v. Third Ave. R. R. Co.*, 45 id., 63; *People v. Cook*, 8 N. Y., 67; *Tooley v. Bacon*, 70 id., 34; 2 Wait's L. & Pr., 634; 38 N. Y., 186; 32 id., 440, 441; *Wood v. Tunnickliff*, 74 id., 38.) The admissions of an executor or administrator when a party to the action are competent evidence against him because he represents the estate and is in privity with the decedent. (1 Greenl. on Ev., § 139; 2 Cowen & Hill's Notes, note 172; 1 Phillips' Ev., 90; Starkie on Ev., title admission; *Fraunce v. Gray*, 21 Pick., 243; *Hill v. Buckinmister*, 5 id., 291; *Atkin v. Sawyer*, 1 id., 192;

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Tenny v. Evans, 14 N. H., 343; *Cayuga Bk. v. Bennett*, 5 Hill, 236; *Lane v. Doty*, 4 Barb., 535; *Barger v. Durin*, 22 id., 68; *Wilcox v. Smith*, 26 id., 318; Stevens' Dig. of Ev., p. 66; *Mooers v. White*, 6 Johns. Ch. R., 373; *Brown v. Miller*, 2 Kern., 118; *Forsyth v. Ganson*, 5 Wend., 558; 17 Hun, 5, fols. 197-202.)

MILLER, J. The defendant Howard interposes in this action as a defense that the note was altered without his knowledge or consent, and one of the principal questions controverted upon the trial was whether the alteration was made by the authority, direction or consent of the intestate. In regard to this branch of the case one Mrs. Scranton was called and sworn as a witness for the defendant, and testified that Mr. Church, the plaintiff, came to her house after the decease of his wife and there had a conversation, in the presence of herself and her husband, as to the note in controversy. She was asked to state what was said about it. The question was objected to by the plaintiff's counsel, upon the ground that the declarations of the administrator are not evidence against the payee of the note. The objection was overruled, an exception taken to the ruling of the judge, and the witness testified that Church said he had erased the gold clause in the note because Mrs. Church requested him to do so. Similar testimony relating to the same conversation was offered and received, and the same ruling made by the judge, and the same exception taken in reference to the evidence of the husband of Mrs. Scranton. The plaintiff at the time of the alleged conversation was not acting in the discharge of his duties as administrator; no business was then transacted connected with or relating in any way to the estate, and it does not even appear that he had then been actually appointed and had qualified as such administrator. It is held in the decisions of the courts in this State that the declarations of an administrator or executor cannot be received as evidence as against either his co-executor or co-administrator, or as against the heirs or devisees: (*Hammon v. Huntley*, 4 Cow., 493;

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McIntire v. Morris' Adm's, 14 Wend., 90-97; *Cayuga Co Bank v. Bennett*, 5 Hill, 236; *Lane v. Doty*, 4 Barb., 530; *Elwood v. Deifendorf*, 5 id., 398.) Although the cases cited relate more particularly to the admissions or declarations of a co-executor or co-administrator as against an associate, and the precise question now presented was not decided, it would appear to follow, as a logical sequence of the decisions, that the admission made by a sole administrator or executor, or of all of them together, would be competent evidence and obligatory, if such admission was made while engaged in the performance of some act relating to the estate. The act should be such as called for and made the declaration pertinent, and the declaration should accompany such act, so as to constitute a part of the *res gestæ*. When such is the case, the admissions of an administrator may, we think, bind the estate. But loose declarations to third parties, who have no interest or connection with the estate or the subject matter, entirely distinct from the discharge of the official functions of the administrator, and in no way relating to the estate, cannot have any such effect. The administrator as such had nothing to do with these witnesses in reference to this note, and the declarations, therefore, were not a part of the *res gestæ* and should have been excluded. Nor can the admission of the evidence be upheld upon the ground that the suit was prosecuted for the benefit of the administrator solely. The administrator is bound in the first instance to pay all debts out of the assets of the estate, and, in the absence of proof, it is not to be assumed that no such debts existed.

The distinct objection was not taken to the evidence that it was not shown that the plaintiff was the administrator, and as that defect may have been supplied, and the plaintiff assumed by his objection he was administrator, it cannot now be urged that he was not. But this is not material, as it appears that the admission was not made as an administrator or in any such capacity.

It is claimed that the objection did not present the point we have considered, as it was confined to the payee of the

note. As the payee was dead, it may fairly be regarded as including the representative of her estate. Such was the evident purpose of the objection, and so it was manifestly understood at the time, and we think it sufficiently presented the question whether the admissions of the administrator, under the circumstances, was competent testimony.

Several other questions were raised upon the trial in respect to the ruling of the court as to the admission of evidence. The defendant Fargo, who was the maker of the note, was permitted to testify, against the objection of the plaintiff, in regard to personal transactions which took place between himself and the intestate, and to the circumstances which transpired at the time of the erasure, the judge holding that the Code did not apply to a party who had not interposed an answer and was not interested in the event. Section 829 of the Code of Civil Procedure declares that "upon the trial of an action * * * a party or a person interested in the event * * * shall not be examined as a witness on his own behalf or interest * * * against the executor," etc. The question whether the witness was not a party within this provision and hence incompetent, is not free from difficulty; but however that may be, we think that he was "a person interested in the event" and therefore incompetent to testify as to any personal transaction between himself and the intestate and his testimony was improperly received. He was interested in avoiding a judgment against the defendant Howard, the surety, which would entitle such surety to prosecute and obtain a judgment against the defendant Fargo which he might be compelled to pay. He would be affected by the legal operation and effect of the judgment, and the record would be legal evidence in an action by the surety to recover the amount paid for his principal. (1 Greenl. on Ev., § 390.) The case of *Hobart v. Hobart* (62 N. Y., 80), cited by the defendant's counsel, is not in point in reference to the question last discussed. And the view we have taken upon the question last considered is sustained by the recent case of *Miller v. Montgomery* (78 N. Y., 282).

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It is insisted by the defendant's counsel that there was no error as to the evidence given by Fargo, for the reason that the questions put to the witness did not elicit answers which were liable to exception, and that in some instances the objections were not put upon the ground that the witness was incompetent to testify. It is true that the same objections were not made in each instance, but at the commencement of the testimony the distinct objection was taken to proof of any facts to which Mrs. Church might have testified if living, and the same was overruled, upon the ground hereinbefore stated, and the ruling excepted to by the plaintiff. The same ground of objection was substantially taken twice afterwards, and the judge stated that all evidence of this kind was, under objection and exception. This was quite enough to present the question, for it is evident that the objections first made were intended to and did cover (and were so understood by the judge) all evidence of this description, and that the evidence to which reference has been had was liable to this objection. The testimony related to the same subject, and the plaintiff was not required to repeat his objection to any question put relating to the matter. (*Dilleber v. Home L. Ins. Co.*, 69 N. Y., 257.) The claim, therefore, that the objections were not sufficient, is not sustained. The fact that the plaintiff was subsequently sworn as to the facts proved by Fargo and testified in regard to the erasure, is no valid legal excuse for the admission of the evidence. He was necessarily called to contradict the testimony of Fargo, and that fact did not render the evidence of Fargo competent.

The defendant, Howard, was called and sworn as a witness in his own behalf upon the trial, and was asked the question whether he had any interest in the note or received any benefit from it. The question was objected to upon the ground that the owner of the note was dead, the objection overruled and the defendant excepted. The witness answered that he had not; that he was a mere accommodation maker; that he never paid any interest on the note, nor authorized

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or directed it to be paid, or knew that any interest had been paid. The evidence, we think, was inadmissible as a whole, as it related to a personal transaction with the deceased. The denial of any interest in the note, of itself, might have been controverted by the intestate if she was alive, as well as the statement that he had paid no interest, or authorized or directed any to be paid upon the note. She may have sworn that he did make or authorize payments to be made by the maker, or in some form sanctioned and ratified those which were made after the erasure was known to him, or that he assented to the erasure itself. Even if the evidence as to her interest was cumulative, yet the intestate may have had more knowledge on the subject than the other witnesses who were sworn and contradicted the defendant, so that her evidence would have been considered as controlling and conclusive. The claim that the statement as to the payment of interest was not objected to, is answered by the apparent fact that the whole testimony was responsive to the question put, and hence no further objection was required. It does not appear that any other question besides the one stated, which called out the last part of the answer, was put to the witness, and the testimony was not so remote from the subject of inquiry as to demand an additional objection, independent of that which had been previously made. Under the circumstances, as the objection made clearly covered the entire evidence received, the plaintiff was under no obligation to renew the same.

The court clearly erred in allowing Howard, the defendant, to testify that Fargo had told him that his name was taken off the note, and that he was not liable any longer, and that Mrs. Church said that she would see that his name was taken off. These were the declarations of the defendant which could not bind the plaintiff. The claim that the first question put, asking the witness to state the conversation and which was objected to on the ground that it was hearsay, was not answered, is not available. The next question put asked the witness what Fargo did tell you about the name

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being stricken out, and in substance called for the same conversation, and did not require another and a distinct objection.

The evidence also that the witness did not suppose that he was on the note, and that he could have obtained security before Fargo failed if he had known it, was inadmissible and should have been excluded. It is no answer to the admission of the evidence that the case was submitted to the jury upon the sole question of the alteration of the note. The testimony might very well have had an effect upon the minds of the jury, if they believed Howard's testimony, and it is easy to see that it might have influenced their verdict. The testimony of Howard as to Fargo's declarations obliged the plaintiff to testify upon the same subject; and as he denied that he ever had any conversation with Fargo about striking out Howard's name, and as the testimony of the plaintiff and Howard and Fargo were otherwise conflicting, a question of credibility was presented which may have seriously affected the decision of the issue which was presented to the jury and have done much harm to the plaintiff. Upon no principle was the evidence competent.

We have not deemed it necessary to determine whether the words contained in the note, viz.: "in gold or its equivalent," include the principal as well as the interest on the same. And without expressing an opinion upon that question, for the errors upon the trial which we have considered, the judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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**WILLIAM PIERSON, Plaintiff in Error, v. THE PEOPLE OF
THE STATE OF NEW YORK, Defendants in Error.**

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Upon the trial of an indictment for murder, the prisoner challenged the array of jurors on the ground that, an order having been granted requiring the drawing of additional jurors, one of the boxes required to be kept by the clerk, i. e., that containing the names of jurors who had attended a term of the court, and served, had not been kept, and was not brought into court as required by the Code of Civil Procedure (§ 1059). The challenge was sustained; the prisoner thereupon withdrew it; a jury was empaneled, and the trial proceeded. *Held*, that the prisoner could withdraw his challenge, and that he thereby waived the irregularity.

Cannemi v. The People (18 N. Y., 128), distinguished.

The prisoner was accused of having caused the death of W., the deceased, by poison. A physician who was called to see W. when sick from the the poison, and who examined and prescribed for him, as a witness for the prosecution was asked to state the condition in which he found W. at that time, both from his own observation and what W. told him; this was objected to on the ground that the evidence was prohibited by the statute (Code of Civil Procedure, § 834). The court overruled the objection, and the witness stated what he learned from his own examination of W., made in the presence of W.'s wife and the prisoner, and from their statements. There was nothing of a confidential nature in anything he so learned. *Held*, that the evidence was competent.

The object of the statute prohibiting the disclosure of professional information acquired by a physician in attending a patient, is to protect the the latter, not to shield one charged with his murder.

After evidence had been given on the part of the People showing an intimacy between Mrs. W. and the prisoner, who was a married man, before and after the death of W., and that the prisoner disappeared from his home February 19, 1877, eleven days after the death of W., the prosecution called B., a clergyman who resided in Michigan; he testified that the prisoner called at his residence with Mrs. W., February 26, 1877. The witness was then asked to state what took place between him and them at that time; this was objected to, and the objection overruled. The witness answered, in substance, that he married them, after the prisoner had, under oath, stated that there was no legal objection to his being married. *Held*, that the evidence was competent as showing motive, although it tended to prove another crime than that charged in the indictment.

(Argued December 10, 1879; decided January 13, 1880.)

ERROR to the General Term of the Supreme Court, in the fourth judicial department, to review judgment affirming

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a judgment of the Court of Oyer and Terminer, in and for the county of Livingston, entered upon a verdict convicting the plaintiff in error of the crime of murder in the first degree. (Reported below, 18 Hun, 239.)

The facts appear sufficiently in the opinion.

James Wood, for plaintiff in error. The prisoner could not lawfully withdraw his challenge to the array after it had been sustained by the court. (*Lord Dacres Case*, Kelyng's R., 59; 1 Woodeson, 346; 3 Inst., 30; *People v. Cancemi*, 7 Abb., 271; 18 N. Y., 128; *Rex v. Williams*, Russ. & Ryan's C. C. R., 224; *I'feiffer v. Comm.*, 3 Harris [Penn.], 468; *Rex v. Wolf*, 1 Chit., 401; 18 Eng. C. L., 115; *Comm. v. Canfield*, Thatcher's Cr. Cas., 510; *Stevens v. People*, 10 N. Y., 549; *McCloskey v. People*, 5 Park. Cr. R., 308; 1 Sellon's Pr., 477; *People v. McKay*, 18 J. R., 212; *State v. Williams*, 1 Rich., 188; *People v. Monaghan*, 1 Park. Cr. R., 570.) The court erred in overruling the objection to the facts testified to by the physician Coe as privileged communications. (2 R. S., 406, m. p. §§ 72, 73; Code of Civil Procedure, §§ 833, 834, 835, 836; *People v. Stout*, 3 Park. Cr. R., 670; *Wilson v. Rastall*, 4 T. R., 753; *Rex v. Withers*, 2 Camp., 578; *Bank of Utica v. Messereau*, 3 Barb. Ch., 592; *Parker v. Carter*, 4 Mumf. R., 273; Greenl. Ev., 278; 1 Edw. Ch., 439; 4 Paige, 460; 14 Wend., 637, 641; *Eddington v. Mut. L. Ins. Co. of N. Y.*, 5 Hun, 1; 67 N. Y., 185; *Dilleber v. Home L. Ins. Co.*, 69 id., 256; *Jackson v. Lewis*, 17 J. R., 475; *McClusky v. Cromwell*, 11 N. Y., 601; *Newell v. People*, 7 id., 97.) It was error to overrule the objection to the question to the clergyman from Michigan as it tended to prove another crime than the one charged in the indictment. (*Colman v. People*, 55 N. Y., 81; *People v. Hopson*, 1 Den., 574; *Rosenweig v. People*, 63 Barb., 635.)

D. W. Noyes, for defendant in error. The prisoner by withdrawing his challenge to the array of the jury and consenting to go to trial with the jury summoned waived any

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supposed irregularity in the drawing of additional jurors, and cannot now be heard to question it. (*People v. Ramson*, 7 Wend., 417; *People v. Rathburn*, 21 id., 509, 541, 542; *Gardiner v. People*, 6 Park. Cr. R., 155; *Cancemi v. People*, 18 N. Y., 137; *People v. Cummings*, 3 Park. Cr. R., 343-346, 355, 356; *People v. Mather*, 4 Wend., 229, 245, 246; R. S., pt. 4, chap. 2, tit. 4, art. 2, § 52; *Baker v. Braman*, 6 Hill, 47; Joy on Confessions and Challenges, 229; Sedgwick on Statutes and Const. Law, 111; *Brunkell v. Giles*, 2 Moore & Scott, 41; 9 Bing., 13; *People v. Murray*, 5 Hill, 468-472; *Germand v. People*, 1 id., 343-345; *Embury v. Conner*, 3 N. Y., 511-519; *Lee v. Tilotson*, 24 Wend., 337; *Van Hook v. Whitlock*, 26 id., 43; *N. S. v. Rathborn*, 2 Pain. C. C., 578; *People v. McKay*, 18 J. R., 212-218; *Freeman v. People*, 4 Dew., 9, 31; *Rex v. Wolf*, 1 Chit., 401; *Rex v. Perkin*, Holt's Rep., 403, in 1698.) The testimony of the physician Coc was properly received. (Code, § 834; § 73, art. 8, tit. 3, chap. 7, pt. 38, R. S.; *Wilson v. Rastall*, 4 Durnf. & East., 759, 760; *Dutchess of Kingston's Case*, 11 Har., 242; *People v. Stout*, 3 Park. Cr. R., 670; 1 Greenl. Ev., § 248; *Edingston v. Mut. L. Ins. Co.*, 67 N. Y., 185-194; *Johnson v. Johnson*, 14 Wend., 637-641; 1 Phil. Ev., chap. 6, § 1, p. 163 [3d ed.]; *Merle v. Moore*, R. & M., 390; *Allen v. Public Administrator*, 1 Brad., 221; *Thayer v. Allen*, Selden note, 93; *Hewitt v. Prime*, 21 Wend., 79; Wharton Am. Crim. Law, §§ 591-774; 1 Vernon, 385; *Webb v. R. W. and O. R. R. Co.*, 49 N. Y., 420-426; *Costigan v. M. and H. R. R. Co.*, 2 Den., 609, 610; *Ryan v. N. Y. C. R. R.*, 35 N. Y., 216; *Stephens v. People*, 4 Park., 396, 454, 455; *People v. Thurston*, 2 id., 49; *People v. Lake*, 1 id., 495; 1 Phil. Ev. [3d Am. ed.], 192; *Aveson v. Lord Kinnaird*, 6 East., 188.) The testimony of the witness Butterfield was properly admitted. If for no other purpose it was clearly competent and material on the question of motive. (*People v. Stout*, 4 Park. Cr. R., 71, 72; *People v. Hopson*, 1 Den., 574-577; *Cary v. Hotelling*, 1 Hill, 311; Roscoe's Crim. Ev., 81; 1 Greenl. Ev.,

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§ 63; *People v. Conkey*, 5 Park., 32; *People v. Wood*, 3 Park. Cr. R., 681; *Rex v. Clewes*, 4 Car. & P., 221; *Rex v. Clews*, 19 Eng. Com. L. R., 354; *Woods Case*, 3 Park. Cr. R., 681; *Stork v. State*, 4 Humph., 27, 525-529; *Johnson v. State*, 17 Ala., 618-625; *Walker v. State*, 1 Leigh. [Va.], 514.)

EARL, J. William Pierson, the prisoner, was indicted in Livingston county for murder, in causing the death by poison of Leaman B. Withey, in February, 1877. He was tried at the Oyer and Terminer of that county in February, 1878, and was convicted and sentenced to be hung. His conviction was affirmed at the General Term of the Supreme Court. He has now brought his case into this court by writ of error, and seeks to have his conviction reversed for several errors which have been ably presented for our consideration by his counsel.

The first ground of error alleged has reference to the selection of the jury. At the time of the trial of this case the Code required the county clerk to keep three jury boxes: (Code, §§ 1038, 1050, 1052.) One was to contain, upon ballots deposited therein, the names of all the jurors returned from the various towns in the county by the town officers; another was to contain the names of all jurors who had attended a term of court and served; and a third box was to contain the names of all the jurors, upon duplicate ballots returned by the town officers of the town in which the courts were appointed to be held.

The law provides that if additional jurors are needed at any term of court beyond the number regularly summoned to attend such term, the court may make an order requiring the clerk of the county to draw and the sheriff to notify any number of trial jurors specified in the order, which the court deems necessary, to attend that term; and that the clerk must thereupon forthwith bring into court all the boxes wherein ballots containing the names of trial jurors are deposited; and must, in the presence of the court, publicly

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draw from such box or boxes as the court directs the number of trial jurors specified in the order : (Code, §§ 1058, 1059.) To comply literally with the law, the court must first make the order, the clerk must then bring into court the three boxes, and the court must then direct from which box or boxes the jurors must be drawn.

After the commencement of the term, the court made an order directing the clerk to draw from the county box and the sheriff to summon thirty-six additional jurors ; and later in the term, another order was made that the clerk draw from the county box and the sheriff summon fourteen additional jurors. In pursuance of these orders, the clerk brought into court the county box containing the names of the jurors returned from the various towns in the county by the proper town officers ; and publicly drew therefrom the number of jurors directed, and they were subsequently summoned by the sheriff to attend. It may be inferred, although not expressly so stated in the record, that the names of the jurors thus drawn and summoned were placed in the box with the regular panel for that term. At the time the jurors were thus drawn, the third box above specified, the town box, was also in court, but the second box, containing the names of jurors who had attended and served, was not in court, and such a box was not in fact kept by the clerk, and it did not appear what disposition was made of the jury ballots which should have been deposited in such box.

When the case was moved for trial, the prisoner challenged the array of jurors, and alleged, as a ground of challenge, that the second box was not kept by the clerk and brought into court at the time of drawing the jurors. The district-attorney took issue upon the challenge, and upon the trial of such issue the facts appeared as above stated, and the court sustained the challenge. The prisoner thereupon withdrew his challenge, and a jury was then empaneled and the trial proceeded. It is now claimed by the learned counsel for the prisoner that the challenge was properly sustained ; and that after it was sustained, the prisoner could not law-

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fully withdraw it and go to trial before a jury thus irregularly drawn.

It is not important for us to determine whether the challenge was properly sustained, because, whether it was or not, we are of opinion that the prisoner could withdraw his challenge and waive any irregularity which existed in this case. The maxim *quilibet potest renunciare juri pro se introducto* is of quite general application. One may waive constitutional provisions intended for his benefit: (*Lee v. Tillotson*, 24 Wend., 337; *Van Hook v. Whitlock*, 26 id., 43; *The People v. Murray*, 5 Hill, 468; *Baker v. Braman*, 6 id., 47; *Embury v. Conner*, 3 N. Y., 511.) A prisoner may waive a trial by jury and plead guilty; he may waive a plea of *autrefois acquit* by not interposing it or withdrawing it; he may waive or withdraw a challenge to a juror; he could waive his right to have a challenge of a juror for favor tried by triers, and consent that it be tried by the court; he may waive objections to improper or incompetent evidence; in a court of special sessions he may waive a trial by jury and be tried by the court; he may waive a challenge to the array of jurors by a challenge to the polls; he could consent to the separation of the jury during the trial, when such separation, without such consent, would be ground of error. A man cannot legally be indicted and tried as accessory to a felony until the principal be convicted; and yet, if he go to trial, without insisting on the objection, he is held to have waived it: (*People v. M'Kay*, 18 J. R., 212; *People v. Mather*, 4 Wend., 229, 245, 246; *People v. Rathbun*, 21 id., 509, 542; *Stephens v. People*, 19 N. Y., 549, 563; *Gardiner v. People*, 6 Parker Cr. R., 155.) In *People v. Rathbun*, COWEN, J., said: "The prisoner may even waive his right to a trial at the hands of a jury on the merits, by pleading guilty. Having this power, no one will pretend that he cannot consent to anything less. He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court." In *Cancemi v. The People* (18 N. Y., 128), a case very much relied upon by the counsel for

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the prisoner — twelve jurors were empaneled for the trial, and during the trial the prisoner stipulated that one juror might be withdrawn, and that the trial should proceed with eleven jurors. It did so proceed, and the prisoner was convicted. It was held that the conviction was illegal. The decision was based upon two grounds: that the parties could not by consent alter the substantial constitution of the court; and that the State has an interest in the preservation of the liberties and lives of its citizens, and will not allow them to be taken away without due process of law, even by the consent of those accused of crime. STRONG, J., said: "The substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties;" that "the State, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away" without due process of law;" and he further said that the right to affect, by consent, the conduct of a case in a criminal prosecution, "should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws. Effect may justly and safely be given to such consent in many particulars; and the law does, in respect to various matters, regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary instead of primary evidence may be received; admissions of facts allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid what, without it, would be erroneous."

That case is no authority for the contention of the prisoner's counsel in this case. Here there was due process of law. The prisoner was tried by a common law jury of twelve. The jurors all possessed the qualifications prescribed by statute, and they were selected and returned for jury service by the proper officials in the mode required by

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statute. The consent evinced by the withdrawal of the challenge did not affect the substantial constitution of the tribunal before which the prisoner was tried. The objects of all the jury laws are to distribute the burden of jury service among all those liable to such service and to secure impartial jurors of the requisite qualifications. To secure the first object lists of jurors are required to be made and returned to the county clerk in each county every three years. The names thus returned are required to be put into a box, from which jurors for any term of court are required to be drawn, and when a juror has once attended and served, his name is not to be returned to that box, but is to be placed in another box, to the end that he may not be drawn for service again until all have been drawn from the box first named: (Code, § 1051). The second object is attained by requiring that only persons of the prescribed qualifications shall be returned for jurors, and that they shall be chosen by lot. Now all these substantial provisions were observed in this case. The jurors upon the array were all persons who had been returned as such by the proper officials. They all possessed the statutory qualifications, and they were chosen by lot. When these substantial conditions exist, the rest must generally be matter of form, which can be arranged or waived by consent, tacit or expressed. Here the only irregularity alleged is that the second box was not kept or brought into court. The fact that it was not kept was not known to the court at the time it made the order designating the box from which the jurors were to be drawn. In the exercise of its discretion, and to carry out the manifest purpose of the law, it ordered the jurors to be drawn from the first box. A court would not be expected to order jurors to be drawn from the second box, containing the names of those who had once served, so long as there were sufficient names in the first box. It can not, therefore, be inferred, if all the boxes had been kept and brought into court and the orders then made, that different jurors would have been drawn and summoned from

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those who were actually drawn and summoned. But even if it could be thus inferred, it cannot be denied that the persons empaneled to try the prisoner were jurors made so in the mode prescribed by law and possessing lawful qualifications. If, therefore, there was any irregularity which would be ground of error, it was merely formal, affecting no public interest, trenching upon no public policy ; and to hold that it could not be waived would be without precedent and against reason.

While Withey was sick, suffering from the poison which is supposed to have been administered to him, Dr. Coc, a practicing physician, was called to see him by the prisoner ; and he examined him and prescribed for him. On the trial, he was called as a witness for The People, and this question was put to him : “ State the condition in which you found him at that time, both from your own observation and from what he told you ? ” The prisoner’s counsel objected to this question on the ground that the information which the witness obtained was obtained as a physician, and that he had no right to disclose it ; that the evidence offered was prohibited by the statute. The court overruled the objection, and the witness answered, stating the symptoms and condition of Withey, as he found them from an examination then openly made in the presence of Withey’s wife and the prisoner, and as he also learned them from Withey, his wife, and the prisoner. There was nothing of a confidential nature in anything he learned or that was disclosed to him. The symptoms and condition were such as might be expected to be present in a case of arsenical poisoning. It is now claimed that the court erred in allowing this evidence, and the statute (§ 834 of the Code) is invoked to uphold the claim. That section is as follows : “ A person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.” This provision of the Code is a substantial re-enactment of a provision contained in the Revised Statutes : (2 R. S. 406). Such evi

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dence was not prohibited at common law. The design of the provision was to place the information of the physician, obtained from his patient in a professional way, substantially on the same footing with the information obtained by an attorney professionally of his client's affair. The purpose was to enable a patient to make such disclosures to his physician as to his ailments, under the seal of confidence, as would enable the physician intelligently to prescribe for him; to invite confidence between physician and patient, and to prevent a breach thereof: (*Edington v. Mut. L. Ins. Co.*, 67 N. Y., 185; 77 id., 564.)

There has been considerable difficulty in construing this statute, and yet it has not been under consideration in many reported cases. It was more fully considered in the *Edington case* than in any other or all others. It may be so literally construed as to work great mischief, and yet its scope may be so limited by the courts as to subserve the beneficial ends designed without blocking the way of justice. It could not have been designed to shut out such evidence as was here received, and thus to protect the murderer rather than to shield the memory of his victim. If the construction of the statute contended for by the prisoner's counsel must prevail it will be extremely difficult, if not impossible, in most cases of murder by poisoning to convict the murderer. Undoubtedly such evidence has been generally received in this class of cases, and it has not been understood among lawyers and judges to be within the prohibition of the statute.

How then must this statute be construed? The office of construction is to get a meaning out of the language used, if possible. If the words used are clear and unmistakable in their meaning, and their force cannot be limited by a consideration of the whole scope of the statute or the manifest purpose of the Legislature, they must have full effect. But in endeavoring to understand the meaning of words used, much aid is received from a consideration of the mischief to be remedied or object to be gained by the statute. By such consideration, words otherwise far-reaching in their scope

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may be limited. Statutes are always to be so construed, if they can be, that they may have reasonable effect, agreeably to the intent of the Legislature; and it is always to be presumed that the Legislature has intended the most reasonable and beneficial construction of its acts. Such construction of a statute should be adopted as appears most reasonable and best suited to accomplish the objects of the statute; and where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the Legislature to avoid such consequence. A construction which will be necessarily productive of practical inconvenience to the community is to be rejected, unless the language of the law-giver is so plain as not to admit of a different construction: (Potter's Dwarries on Statutes, 202).

The plain purpose of this statute, as in substance before stated, was to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead. It could have no other purpose. But we do not think it expedient, at this time, to endeavor to lay down any general rule applicable to all cases, limiting the apparent scope of this statute. We are quite satisfied with the reasoning upon it of Judge TALCOTT, in his able opinion delivered at the General Term of the Supreme Court, and we agree with him "that the purpose for which the aid of this statute is invoked, in this case, is so utterly foreign to the purposes and objects of the act, and so diametrically opposed to any intention which the Legislature can be supposed to have had in the enactment, so contrary to and inconsistent with its spirit, which most clearly intended to protect the patient and not to shield one who is charged with his murder, that in such a case the statute is not to be so construed as to be used as a weapon of defense to the party so charged, instead of a protection to his victim." This objection was, therefore, not well taken.

Upon the trial the People gave evidence tending to prove that the relations between the prisoner and Mrs. Withey were somewhat intimate prior to the death of her husband ; but there was no clear proof that they were criminal. After the burial of her husband and upon the same day, the prisoner took her and her sister to the residence of the latter a distance of several miles, and he returned with Mrs. Withey alone, about half past one in the night of that day. The prisoner was a married man, having a wife and five children. A few days after Withey's death, he began to sell his property, and on the nineteenth day of February, eleven days after the death, he disappeared from his home. After these facts had been proved, and near the close of the case on the part of the prosecution, the People called Isaac Butterfield as a witness ; and he testified that he resided in Jackson, Michigan, that he was a clergyman ; that he saw the prisoner and Mrs. Withey at his residence in Jackson on the 26th day of February, 1877 ; and that by the laws of Michigan, clergymen were authorized to perform marriage ceremonies. He was then asked this question : " You may state what took place between those parties and yourself at the time you met them in Michigan ? " The prisoner's counsel objected to this question, and the objection was overruled. The witness answered that they came to him and wished to be married ; that he administered an oath to the prisoner, as he was a stranger to him ; that the oath was that he would correctly, according to his best knowledge and belief, answer the questions addressed to him relative to his eligibility to the matrimonial alliance he proposed ; that he then asked him if he knew any legal objection to his entering into the matrimonial alliance, and he answered that he did not ; and then, after asking them other questions touching age, birth-place, residence and occupation, he married them according to the laws of Michigan. I think the evidence was competent. Crime is never committed without a motive ; and hence, on the trial of a person charged with crime, it is always competent to give evidence showing the motive

which induced the criminal act. Where the crime is clearly proved and the criminal positively identified, it is not important to prove motives. But where the case depends upon circumstantial evidence, and the circumstances point to any particular person as the criminal, the case against him is much fortified by proof that he had a motive to commit the crime. Where the motive appears, the probabilities created by the other evidence are much strengthened. This evidence tended to prove that the motive which operated upon the prisoner was the desire to possess Withey's wife ; that his passion for her was so absorbing that he was determined to overcome all obstacles standing in his way. One obstacle was the husband, and he was murdered. Marriage was either necessary or desired ; and when he was confronted with the necessity of taking the oath, which he could not truly take, he overcame that obstacle by falsely taking it. Thus, to accomplish his end, he commits two crimes ; and the last has an intimate relation to the first. By the last he consummates a purpose in part achieved by the first ; and the fact that he would take this false oath and enter into this marriage, shows the overpowering nature of the motive which impelled him. That such proof is competent, even if it tends to prove another crime, has frequently been decided : (*The People v. Wood*, 3 Parker, Cr. R., 681 ; *Stout v. The People*, 4 id., 71.)

There are other exceptions to which our attention has been called. We have given them careful examination, and are of opinion that they are so clearly groundless that they do not need particular notice here. We concur in what was said about them at the General Term.

The judgment should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

Statement of case.

DANIEL PRATT et al., Assignees, etc., Appellants, v. HENRY
W. SHORT et al., Respondents.

79	437
151	87
79	437
156	560
79	437
162	810

Under its charter (chap. 816, Laws of 1868) the People's Safe Deposit and Savings Institution had power to loan its capital and funds, but was restricted in its investments to such securities as are specified in its charter (§ 11); this did not include commercial paper.

Accordingly *held*, that as the discounting of commercial paper is prohibited by statute (1 R. S., 712, §§ 3, 6), to any corporation not authorized by law so to do, and as paper so discounted is declared void, that a promissory note discounted by said corporation was void.

But, *held*, that the illegal action of its directors in thus investing its funds did not work a forfeiture of the money loaned, and that this might be recovered, although the security was void.

The history of the restraining acts given, and the authorities on the subject collated.

Where a prohibitory statute points out the consequences of its violation, and it appears to have been the legislative intent to exclude any other penalty or forfeiture than such as is declared in the statute, no other will be enforced; and an action may be maintained upon the transaction, of which the prohibited act was a part, if it can be done without sanctioning the illegality.

(Argued December 12, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of defendants, entered upon an order reversing a judgment in favor of plaintiffs, entered upon the report of a referee, and directing final judgment for defendants.

The nature of the action and the facts are set forth sufficiently in the opinion.

Daniel Pratt, for appellants. The fact that the institution is made subject to other provisions of the statutes, shows that it was not designed that it should be subject to the restraining act. (Brooms' Legal Maxs., 592, 595; Dwarris on Statutes, 605; *People v. Utica Ins. Co.*, 15 J. R., 383; *Crocker v. Whitney*, 71 N. Y., 167; *Gregory v. Des Anges*, 3 Bing. [N. C.], 85-87; *Reg v. Caledonia R. Co.*, 16 Ad. &

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El., 31; *Weekler v. First Nat. Bank*, 42 Md., 393; *Whitney v. First Nat. Bank of Brattleboro*, 50 Ves., 398; *Fowler v. Scully*, 72 Penn. St., 461.) The note in suit was valid. (*Utica Ins. Co. v. Scott*, 8 Cow., 709; *Utica Ins. Co. v. Pardow*, 2 Hall, 515; *People v. Utica Ins. Co.*, 15 J. R., 358-392.) Where it is a simple question of authority in the corporation to make the contract in question, a party having had the benefit of the contract cannot be permitted to question its validity. (*Whitney Iron Co. v. Barlow*, 63 N. Y., 62-70; *Parish v. Wheeler*, 22 id., 494-508; *Palmer v. Lawrence*, 3 Sand. [Supreme], 161; *Silver Lake Bank v. North*, 4 Johns. Ch., 370; Albany Law Jour. [Jan. 1, 1878], 426; *State of Md. v. Worman*, 6 Hill, 37; *Carey v. Cleveland and Toledo R. R. Co.*, 29 Barb., 35-52; 13 Gray, 124; Brice on Ultra Vires, 373-375.) The bank held the relation to its depositors substantially as trustee, and its unauthorized acts should be treated as the unauthorized acts of trustees of individuals. (*U. S. Trust Co. v. Brady*, 20 Barb., 119-121; *Mott v. U. S. Trust Co.*, 19 id., 558-571; *Butts v. Wood*, 37 N. Y., 317; *Coleman v. Second Avenue R. R.*, 38 id., 301; *Great Eastern R. R. Co. v. Turner*, 21 W. Rep., 163; Same, Chancery App. [8 Law R.], 149; *Olivers Lees' Bank v. Walbridge*, 1 Clinton Dig., 349, par. 209.) As a general rule, when a contract is not expressly declared to be void, the law must be examined as a whole to ascertain whether or not its makers intend that a contract contravening it in some particulars should be held void. (*Harris Langley*, 12 How., 79; *U. S. Trust Co. v. Brady*, 20 Barb., 119-121; *Sacketts Harbor Bk. v. Codd*, 15 N. Y., 249.) The statutes requiring certain things to be done are generally directory merely. (*City Bank of Columbus v. Bruce & Fay*, 17 N. Y., 507-515.) Conceding that the instrument itself is void, as being prohibited by the statute, the defendants are still liable on the discount for money lent. (*Parker v. Rochester*, 4 Johns. Chy. R., 332; *Utica Ins. Co. v. Bloodgood*, 4 Wend., 652; *Utica Ins. Co. v. Caldwell*, 3 id., 290; *Utica Ins. Co. v. Kipp*, 8 Cow., 20; *Utica Ins. Co. v. Scott*,

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19 J. R., 1; *Utica Ins. Co. v. Kipp*, 3 Wend., 369; *Utica Ins. Co. v. Hunt*, 1 id., 56; *Parker v. Rochester*, Sup.; *Buffalo City Bank v. Cadd*, 25 N. Y., 163-169; 7 Wend., 31; *Parsons Con.*, 380; 14 N. Y., 189; 2 Burr., 1080; 2 Strange, 1140-1155; *Oneida Bank v. Ontario Bank*, 21 N. Y., 490; 2 *Parsons Con.*, 263; 22 Rich., 181.) The restrictions thrown around loans were for the benefit of the creditors and depositors, and loans made and property transferred in violation of these restrictions, is a fraud upon them and void. (*Nathan v. Whittoch*, 9 Paige, 151; 1 R. S. [6th ed.]; *Gillett v. Moody*, 3 Comst., 479; *Wilson v. Forsyth*, 24 Barb., 105; *Leavitt v. Tylee*, 1 Sand. Chy., 207; *Bank of America v. Polloch*, 4 Ed. R. Chy., 215; *Gillett v. Phillips*, 3 Kern., 114; *Tuckerman v. Brown*, 33 N. Y., 297; *Steam Nav. Co. v. Weeld*, 17 Barb., 380; *McCollough v. Moss*, 5 Den., 567; *Haxture v. Bishop*, 3 Wend., 3; *First Nat. Bk. of Lyons v. Ocean, etc., Bank*, 60 N. Y., 278; 8 Law R. Chy., 149; *Great Eastern R. R. Co. v. Turner*, 21 W. R., 163; *Talmage v. Pell*, 3 Seld., 328; 2 R. S., 463, § 33 [m. p.]; Act, 1858, chap. 314; *Osgood v. Layton*, 48 Barb., 464; affd., 3 Keyes, 521-523; *Southard v. Benson*, 72 N. Y., 424.)

Geo. N. Kennedy, for respondents. Defendants were not liable as indorsers, as the note not having been discounted by the institution was by the restraining act void in its hands, and could not be enforced. (1 Edmonds Stats., 557, § 4; 2 R. S. [5th ed.], 981, §§ 3, 4, 5, 8, 11, 18.) The defendants were not liable to said institution as for money had and received, or lent and advanced by it to them for the money paid upon the discount of said note. (*Utica Ins. Co. v. Scott*, 19 J. R. 1; *Utica Ins. Co. v. Caldwell*, 3 Wend., 296; *Utica Ins. Co. v. Bloodgood*, 4 id., 652; *Utica Ins. Co. v. Kipp*, 8 Cow., 20; *New Hope Del. Bldg. Co. v. Poughkeepsie Silk Co.*, 25 Wend., 650; *Curtis v. Leavitt*, 15 N. Y., 98; *Tracy v. Talmage*, 14 id., 189; *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co. of N. Y.*, 7 Wend., 31; *Bissell v. Mich. South. R.*

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R. Co., 22 N. Y., 265; *Com. on Contracts*, 30; *Bank of Salina v. Alvord*, 31 N. Y., 474; *N. Y. Firemen Ins. Co. v. Ely*, 2 Cow., 678; 22 N. Y., 265.)

ANDREWS, J. The People's Safe Deposit and Savings Institution, a corporation created by chapter 816 of the Laws of 1868, in August, 1872, upon the application of defendants, composing the firm of H. W. Short & Co., discounted a note made by one Alice Van Cleek, for \$1,900, payable to the order of H. W. Short & Co. seventy days after its date, and indorsed by the payees, who received the proceeds of the discount. The note was taken by H. W. Short & Co. upon a debt owing by the maker to the payees. It was not paid at maturity, and was duly protested. The Safe Deposit Company in September, 1872, became bankrupt, and the plaintiffs were appointed assignees in bankruptcy of the insolvent corporation. This action is brought by the plaintiffs as such assignees against the defendants, and in their complaint they allege three causes of action: *first*, a cause of action against the defendants as indorsers of the note referred to; *second*, for money lent and advanced by the Safe Deposit Company to the defendants upon the security of the note, and *third*, for money had and received by them, to and for the use of the corporation.

It is admitted that the note has not been paid, and that the Safe Deposit Company has never been re-imbursed in any way for the money advanced to the defendants on the discount of the paper. When called upon to pay the note, according to the terms of their engagement, their sole defense is that the Safe Deposit Company was prohibited by law from discounting notes, or loaning its funds on personal security, and that having acquired title to the note through this illegal transaction the contract of indorsement is void. In answer to the claim for the repayment of the money it is insisted that the loan or advance of the money, and the taking of the note with the indorsement as security therefor, constituted one single and indivisible act, incapable of separa-

tion, and that the transaction as a whole falls under the condemnation of the law, so that neither the corporation nor its assignees in bankruptcy, have a remedy either upon the security, or to recover back the money advanced upon the void paper.

The question as to the power of the Safe Deposit Company to discount notes, depends upon its charter, and the limitations and restrictions contained in the general statutes of the state, applicable to this corporation. By the first section of the charter, the persons named, and such other persons as should become stockholders, were constituted a body corporate, under the name and style of "People's Safe Deposit and Savings Institution of the State of New York." The eighth section provides that the capital stock of the corporation shall be \$200,000, subject to be increased as therein provided. The fifth section declares the business and general object of the corporation to be, to take and receive on deposit as bailee for safe keeping and storage, coin, bullion, etc., and personal property, upon the terms and for such compensation as may be agreed upon between the corporation and the bailors, and authorizes the corporation "to receive money from any estate, company, association, person or persons on deposit, and give a receipt, certificate, or book therefor, to the party or parties making such deposits, and which shall be subject to their order only, and any rate of interest, not exceeding that allowed by law, shall be paid for such deposits." The sixth section provides that the corporation may make such special regulations, in reference to deposits, as shall best aid the depositors and parties interested by accumulating and increasing the same, allowing and receiving such rate of interest therefor not greater than the rate before mentioned, as may be agreed upon, and empowers the corporation to negotiate the stocks and bonds of the United States, or of the several States, and the authorized bonds of municipalities and corporations. The seventh section authorizes the corporation to purchase and hold such real and personal estate as may be necessary and convenient for the accom-

modation and transaction of its business, and also "to take and hold any real estate as security for, and in payment of loans or debts due, and to become due to the corporation." The eleventh section provides for investments of the capital and funds of the corporation in the words following: "It shall be the duty of the board of directors to invest the capital stock of the said corporation, and to keep the same invested in good securities; and it shall be lawful for the same to make such investments of its capital, and of the deposits and funds accumulated by its business, or any part thereof, in bonds and mortgages, on unincumbered real estate, worth at least fifty per cent more than the sum loaned thereon, and also in the public securities or stocks of any State, or of the United States, or in the stocks or bonds of any city, county, or town, or corporation, or association, or otherwise, of any State, or the United States, in manner or form as the directors and officers of said corporation think proper." The fourteenth section declares that the corporation shall possess the general powers and privileges, and be subject to the liabilities and restrictions contained in title third of chapter eighteen of the first part of the Revised Statutes, so far as applicable thereto.

It is clear from a reference to the provisions of the charter that the corporation was authorized to loan its capital and funds. This is clearly inferrible from the language of the seventh, and other sections, and without this power its business of receiving and paying interest upon deposits could not be carried on. But the mode of investment is prescribed in the eleventh section, and the specification of the particular securities in which it should be lawful for the corporation to invest, operates by implication to restrain and prohibit investments in any securities other than those particularly enumerated. This rule of construction has been frequently recognized and applied. In *New York Firemen Ins. Co. v. Ely* (2 Cow., 678), SUTHERLAND, J., referring to the claim that the company in that case was not prohibited from investing its surplus funds in loans upon promissory notes, said: "The

sixteenth section of the act expressly provides that it shall be lawful for the corporation to invest their capital, or any portion of it either in the stock of the United States, or of the individual States, thus by the strongest implication prohibiting any other mode of investment, and destroying the inference which might have resulted from the absence of all regulations on the subject." (See also *People v. Utica Ins. Co.*, 15 J. R., 383; *North River Ins. Co. v. Lawrence*, 3 Wend., 482; *Crocker v. Whitney*, 71 N. Y., 161.) The specification in the eleventh section of the charter in question does not include investments by way of loan upon, or discount of notes or other commercial paper, made by individuals. The words "or otherwise" as used in the section if they have any intelligible meaning, can only be construed as authorizing an investment in the obligations of counties, cities, etc., other than the stocks or bonds mentioned in the preceding part of the section.

But the intention of the Legislature to prohibit the corporation from discounting or loaning money on the security of commercial paper is not left alone to the inference or implication from the language of the eleventh section of the charter. The fourteenth section incorporates with the act the provisions of the third title of chapter eighteen, of the first part of the Revised Statutes, so far as applicable. The fourth section of that title declares that "no corporation created, or to be created, and not expressly incorporated for banking purposes shall by any implication or construction be deemed to possess the power of discounting bills, notes, or other evidences of debt, of receiving deposits," etc.

The Safe Deposit Company was not expressly incorporated for banking purposes. The constitution of 1846 (art. 8, § 4) prohibited the Legislature from granting a special charter for banking purposes, and the charter in question while it conferred upon the corporation created thereby the power to receive deposits, which is a banking power, did not intend by the charter to create a banking corporation. The constitution referred to corporations possessing general banking

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powers. The principal functions of such a corporation, to wit: the power to issue notes to circulate as money, and discounting commercial paper, were not conferred. The validity of the charter creating this corporation is not questioned, and the corporation not being one expressly incorporated for banking purposes, it had no power to discount notes or commercial paper, as appears by the express language of the section of the Revised Statutes alluded to. But the corporation was also subject to the provisions of the statute to restrain unauthorized banking, commonly known as the restraining act. This point is established by the decision of this court in *The New York State Loan and Trust Co. v. Helmer* (77 N. Y., 68), where the question was presented under a charter similar in respect to the point we are now considering, to the charter in question. The third section of the restraining act (1 R. S., 712), declares that "no incorporated company without being authorized by law, shall employ any part of its effects or be in any way interested in any fund that shall be employed for the purpose of receiving deposits, making discounts, or issuing notes, or other evidences of debt, to be loaned or put in circulation as money." The sixth section declares that all notes or other securities for the payment of money "made or given to secure the payment of any money loaned or discounted by any incorporated company, contrary to the provisions of the third section of this title, shall be void."

It appears from the evidence in the case that the corporation in question, at, and prior to the time of the discount of the note set out in the complaint, used its funds derived from deposits and otherwise, in discounting commercial paper, and exercised the usual and ordinary powers of a bank of discount. This course of business was expressly prohibited, by the restraining act, and independently of that act, was in violation of the restrictions imposed by the eleventh section of the charter of the company.

I have no difficulty therefore in reaching the conclusion that the discount by the corporation of the note in question, was unlawful, and upon general principles of law, applicable

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to the subject as well as by the terms of the restraining act, the security taken by the company was void, and furnishes no ground of action. (*Thalimer v. Brinkerhoff*, 20 J. R., 386; *N. Y. Firemen's Ins. Co. v. Ely*, *supra*; *Bank of Salina v. Alvord*, 31 N. Y., 474; *Crocker v. Whitney*, 71 id., 161; *N. Y. State Loan and Trust Co. v. Helmer*, 77 id., *supra*.)

It is claimed, however, that the plaintiffs as representatives of the insolvent corporation notwithstanding the invalidity of the note, are entitled to recover the money received by the defendants upon the void security, and this presents the only remaining question in the case.

It is no doubt the general rule of law, that no right of action can spring out of an illegal contract. And the rule that an illegal contract cannot be enforced, applies as well to contracts *malum prohibitum*, as to contracts *malum in se*. But it does not necessarily follow that all the consequences attending a contract, which is contrary to public morals, or founded on an immoral consideration, attend and affect a contract *malum prohibitum* merely. The law in the former case will not undertake to relieve parties from the position in which they have placed themselves, or to adjust the equities between them. But in the latter case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and if justice and equity require a restoration of money or property, received by either party thereunder, it will, and in many cases has given relief. So also a prohibitory statute may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the Legislature intended to define such consequences, and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced, and if an action can be maintained on the transaction of which the prohibited transaction was a part, without sanctioning the illegality, such action will be entertained. The case of *Robinson v. Bland* (2 Burr., 1077), is a leading case, illustrating this principle. The statute

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(9 Anne, chap. 14) declared that "all notes, bills, bonds judgments, mortgages or other securities for money won or *lent* at play, shall be void," etc. The declaration counted upon a bill of exchange drawn by the defendant's intestate, and also contained the money counts. The bill was given, in part, for money won at play by the plaintiff of the defendant's intestate, and in part for money lent at play to the intestate. The defendant interposed the statute as a bar to the recovery. The defense was allowed as to money won, but was overruled as to the money lent. Lord MANSFIELD said: "As to the money won, we think it cannot be recovered; as to the money lent, the plaintiff is entitled to it." Mr. Justice DENISON said: "There is a distinction between the contract and the security." Mr. Justice WILMOT, speaking of the claim for money lent, said: "The contract may be good, though the security be void; and I think the contract is good, though the security is void by the statute of 9 Anne."

In determining whether the Legislature intended, in the charter in question, that a violation by the company of the restriction as to investments, contained in the eleventh section, should not only render the unauthorized security void, but also work a forfeiture of the money loaned thereon, it is important to consider the purpose and object which the Legislature had in view in making the restriction. Plainly, the main object was to secure the fund of depositors against loss by insecure and hazardous investments. The State, by the charter, held out the company as a savings bank. The Legislature well understood that it would be made the custodian of the savings of individuals dealing with the corporation, and it was eminently wise and just that the bank should be so restricted in respect to the character of the investment it should make as to afford reasonable assurance that the trust would be safely administered. The risk of losing the benefit of securities taken in violation of the charter, would naturally induce care on the part of the managers of the corporation in confining investments to the

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authorized securities, but to hold that the illegal action of the directors in investing in unauthorized securities, not only debarred a recovery thereon, but also put the fund itself thus illegally used, and which the restriction was intended to protect, beyond the power of reclamation from the hands of the borrower, would seem to contravene rather than support the policy upon which the restriction was founded.

The effect of the restraining act upon contracts made in violation of its provisions, was considered in a series of cases, known as the Utica insurance cases, commencing with the case of *Utica Insurance Co. v. Scott* (19 J. R., 1). In these cases the company had, in violation of the restraining act, carried on the business of discounting paper, exercising in respect thereto ordinary banking power. And it was held that the securities taken on such discounts were void, but that the money loaned could be recovered. The court, in the case in *Johnson*, say: "the lending money is not declared to be void, and, therefore, whenever money has been lent it may be recovered, although the security itself is void," citing, among other authorities, the case of *Robinson v. Bland* (*supra*). This distinction was adopted and followed in several subsequent cases. (*Utica Ins. Co. v. Kip*, 8 Cow., 20; *Utica Ins. Co. v. Cadwell*, 3 Wend., 296, and *Utica Ins. Co. v. Bloodgood*, 4 id., 652.) These cases have been criticised, but have never been overruled. (*Mercein v. People*, 25 Wend., 64; *Tracy v. Talmage*, 14 N. Y., 189; *Curtis v. Learitt*, 15 id., 97.) The first restraining act was passed in 1804, and was re-enacted in 1813 (2 R. L., 234), and extended in 1818. (Laws 1818, chap. 236.) The object of these enactments, as shown by SAVAGE, C. J., in *New York Firemen's Ins. Co. v. Ely* (*supra*), was to protect the chartered banks in the monopoly of banking, and to exclude other corporations, associations or individuals from conducting a banking business in either department, of issue, deposit or discount. But the State subsequently departed very widely from this policy. In 1837 the Legislature repealed the restriction before

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existing, preventing individuals or unincorporated associations from keeping offices of deposit and discount. (Laws of 1837, chap. 20.) This act, as was said by COMSTOCK, J., in *Curtis v. Leavitt* (15 N. Y., 97), reduced banking to a private business, except in the department of creating a circulating medium. After this repeal any person or association except incorporated companies could conduct the business of receiving deposits and making discounts. In 1838 the Legislature, by the general banking law, opened the whole franchise of banking to any person or association of persons, subject only to the condition of complying with the provisions of the act.

It will be seen, from this reference to the law, that the policy upon which the restraining acts were passed, viz. : the securing of the monopoly of banking to special favorites of the Legislature, has been abandoned. Any individual, or association of individuals, may now conduct the business of receiving deposits and discounting commercial paper. The restraint continues as to incorporated companies not authorized by their charter to conduct the business. The only public policy upon which this remaining restriction upon incorporated companies against discounting paper seems now to rest, is that of restraining corporations from exercising powers not granted by their charters. The Utica insurance cases have stood as the law of the State for more than forty years. They gave a construction to the restraining laws which has never been reversed. The court is not called upon at this late day, in a case similar in principle, and involving the construction of the same statute, to reconsider the grounds of those decisions, especially when there remains but a remnant of the policy upon which they were founded, and when the business of discounting notes has been made lawful as to all the world except corporations not authorized by their charters to conduct it. In view of the special language of the restraining act, and the specification of the consequences which should follow the unlawful discount of commercial paper, there is great force in the sug-

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gestion that the Legislature regarded the particular penalty imposed, and the remedy by *quo warranto* or by an action in equity to restrain the exercise by a corporation of unauthorized powers, as a sufficient protection against corporations, or individuals unlawfully engaging in the business of discounting paper, and that it was not intended that they should also forfeit all claim to money loaned or advanced upon the prohibited security.

The justice of the particular case before us calls for no departure from these decisions. If the defendants avoid their indorsement it is the plainest equity that they shall restore the money which they received on the faith of it.

The judgment of the General Term should be reversed, and the judgment of the Special Term affirmed, with costs.

All concur.

Judgment accordingly.

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162 .310

DANIEL PRATT et al., Appellants, v. NATHAN P. EATON
et al., Respondents.

Defendant E. executed his bond and mortgage to secure the People's Safe Deposit and Savings Institution, for any indebtedness it had against the mortgagor, "upon or by reason of any promissory note, bill of exchange, overdraft, or otherwise." Subsequently said corporation loaned to the mortgagor various sums of money upon the discount of his notes, which expressed that the maker had deposited the bond and mortgage as collateral. In an action to foreclose the mortgage, *held*, that the notes were void, as the corporation had no power, under its charter, to loan money on personal security (chap. 816, Laws of 1868), and was prohibited by statute from discounting commercial paper (1 R. S., 712, §§ 3, 6); but that the corporation was authorized by its charter (§ 11) to invest in bonds and mortgages; that there was a loan which was within the condition of the mortgage; that the fact that the loan was made by way of discount, and upon the security of the notes, as well as of the mortgage, did not vitiate the latter; and that it was a valid security for the loan and enforceable as such.

Pratt v. Eaton (18 Hun, 298), reversed.

(Argued December 12, 1879; decided January 13, 1880.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of defendants, entered upon an order reversing a judgment in favor of plaintiffs, entered upon the report of a referee, and directing final judgment for defendants. (Reported below, 18 Hun, 293.)

This was an action to foreclose a mortgage.

The plaintiffs are the assignees in bankruptcy of the "People's Safe Deposit and Savings Institution of the State of New York," a corporation organized under the provisions of chapter 816, of the Laws of 1868. The mortgage was executed by the defendants, Eaton and his wife, together with a bond of Eaton, to which it was collateral, to Patrick Lynch, in trust for the corporation, to secure it for any indebtedness it might hold against Eaton, "upon or by reason of any promissory note, bill of exchange, check, overdraft, or otherwise." At the time when the corporation was adjudged a bankrupt it held four promissory notes made by Eaton, for the amount of which, being \$950, besides interest, the plaintiffs claimed the right to enforce the lien created by the mortgage. The fact that the notes were discounted by said corporation was admitted by the plaintiffs, as was also the fact that the corporation, from its organization to its failure, and during the time when the notes were discounted, kept an office of discount and deposit in the city of Syracuse, and carried on a large business in the discount of notes and other commercial paper.

Further facts appear in the opinion.

Daniel Pratt, for appellants. The money in suit having been loaned on bond and mortgage the transaction was legal. (Laws of 1868, p. 1839, §§ 5, 6, 7, 11.) The institution being authorized to loan its deposits and funds accumulated in business in such manner as the officers thereof should, in their discretion, deem proper, there is no restriction upon them as to the form of the loans provided the requisite security be taken. (Laws of 1868, p. 1843, § 11.) The

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right to loan includes the right to discount paper. (*N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow., 693; *People v. Utica Ins. Co.*, 15 J. R., 392; *Talmage v. Pell*, 3 Seld., 342; *Smith v. Ex. Bank of Pittsburg*, 26 Ohio, 141; 15 id., 69.) It is not material that the loan in this case was for a short time. A loan cannot be said not to be an investment, because it is short. (*Utica Ins. Co. v. Scott*, 8 Cow., 710-719; Laws 1876, p. 400, § 27; Laws 1866, p. 1282, § 9; Laws 1866, p. 1421, § 6; Laws 1866, p. 1202, § 6; *Bard v. Poole*, 12 N. Y., 495-505.) If the notes were void the mortgage may be enforced for money lent. (*Curtis v. Leavitt*, 96 N. Y., 9.)

George D. Cowles, for respondents. A corporation can exercise only such powers as are expressly given to, and such incidental powers as shall be necessary, to the exercise of the powers expressly granted. (1 R. S. [Edm. ed.], 557-600 [m. p.]; *Chas. River Bridge v. Warren Bridge*, 11 Pet., 420-544; *Richmond and C. R. R. Co. v. Louisa R. R. Co.*, 13 How., 71; *Rice v. R. Co.*, 1 Black., 358; *Jeff. Branch Bank v. S. Kelley*, 1 id., 436; *Binghamton Bridge*, 3 Wall., 51; *Persie v. Del. and Ches. Canal*, 9 How., 172; *People v. Utica Ins. Co.*, 15 J. R., 383; *N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow., 678; *Union Nat. Bank v. Mathews*, 19 Alb. Law Jour., 132; Laws 1868, vol. 2, p. 1839, chap. 816; 1 R. S. [Edm. ed.], 557-600 [m. p.].) Even if the Legislature had intended to confer banking powers upon this corporation, any grant of such power would have been invalid, being in contravention of the constitution. (Constitution of 1846, art. 8, §§ 1, 4; *People v. Utica Ins. Co.*, 15 J. R., 358-390; *N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow., 678; *N. Y. Trust and Loan Co. v. Helmer*, 12 Hun, 35-42; *City Bank of Columbus v. Bruce*, 17 N. Y., 507-515; 1 R. S. [Edm. ed.], 660-712 [m. p.], §§ 1-5.) As the institution was in no manner authorized by its charter to make loans or discounts like the one in question, but was expressly prohibited from so doing, all notes and other securities made or given to secure the payment of money so loaned or dis-

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counted are void. (*In re Jaycox & Green*, 7 Nat. Bank R., 578; S. C., 13 id., 122; S. C., U. S. Circuit Ct. N. Dist. of N. Y.; *People v. Utica Ins. Co.*, 15 J. R., 358; *N. Y. Trust and Loan Co. v. Helmer*, 12 Hun, 35; 20 Alb. L. Jour., 36; *Crocker v. Whitney*, 71 N. Y., 161.) When a corporation enters into a contract prohibited by statute, or unauthorized by its charter, such contract is void, and no recovery can be had thereon by it. (*North River Ins. Co. v. Lawrence*, 3 Wend., 482; *Life and Fire Ins. Co. v. Mech. Fire Ins. Co. of N. Y.*, 7 id., 31; *Crocker v. Whitney*, 71 N. Y., 161-170; *N. Y. Ins. Co. v. Ely*, 2 Cow., 678; *Bank of Salina v. Alvord*, 31 N. Y., 473; *Bissell v. M. S. and N. J. R. R. Co.*, 22 id., 265.) Courts will not aid either party in enforcing an illegal executory contract, nor if executed will they aid either party in setting it aside, or in recovering back what has passed under it. (*Nellis v. Clark*, 4 Hill, 424; *Oneida Bank v. Ontario Bank*, 21 N. Y., 490-496; *Tracy v. Talmage*, 14 id., 162; *Curtis v. Leavitt*, 15 id., 9; *Sacketts Harbor Bank v. Codd*, 18 id., 240; *Knowlton v. Cong. and Empire Spring Co.*, 57 id., 518.) The bond and mortgage in question are merely collateral to an indebtedness arising on the discounted notes, and the illegality of the contract is a defense to them also. (*Swift v. Beers*, 3 Den., 70.)

ANDREWS, J. We have decided at this term, that the People's Safe Deposit and Savings Institution had no power under its charter to loan money on personal security, and was forbidden by the restraining act from engaging in the business of discounting notes and other commercial paper, and could not enforce notes discounted in violation of the act. But we further held in that case that where a loan had been made by the company by way of a discount of a promissory note, the company or its assignees could recover the money loaned, although the security taken was void. The decision referred to, and the principle upon which it rests, sustains the right of the plaintiffs to enforce the mortgage in question. The mortgage was executed to

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Patrick Lynch, an officer of the Safe Deposit Company, and was conditioned to pay to him, or his assigns, \$2,000. Concurrently with the execution of the mortgage, a declaration of trust was executed by the mortgagor and mortgagee, declaring that the mortgage was executed to secure the Safe Deposit Company for any indebtedness it might hold against the mortgagor, "upon or by reason of any promissory note, bill of exchange, check, overdraft, or otherwise." Subsequently, at different times, the company loaned to the mortgagor, money, amounting in all to the sum of \$950, upon the discount of his notes, which notes expressed that the maker had deposited with the company, as collateral security, the bond and mortgage in question. The notes were void, but the company, by the express terms of the eleventh section of the charter, was authorized to invest its funds in bonds and mortgages and other securities specified. There was a loan in this case, and this created an indebtedness to the bank, which was within the condition of the mortgage. The words, "or otherwise," in the declaration of trust, are broad enough to cover any debt which the company might hold against the mortgagor. The fact that the loan was made by way of discount of commercial paper, and upon the security of the notes as well as of the mortgage, does not vitiate the valid security. The substance of the transaction in respect to the mortgage was that it was taken to secure the loan, and not the notes, which at most were mere evidence of the loan. The case of *Curtis v. Leavitt* (15 N. Y., 97), is, we think, in point. In that case a banking corporation in this State loaned of bankers in Philadelphia certain sums of money, for which the borrower issued to the lenders time certificates of deposit, and also pledged its bonds as security for the payment of the certificates. The certificates were held to be illegal, and void, and it was claimed that the bonds pledged to secure the certificates must fall with them. But it was held that the loan being valid, the law, notwithstanding the form of the transaction, annexed the pledge to the debt for the money

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lent, and not to the void certificates, and the court enforced the bonds against the assets of the corporation.

We are of opinion that the mortgage in question is a valid security for the loan made to the defendant Eaton, and it follows that the judgment of the General Term should be reversed, and the judgment of the Special Term affirmed.

All concur.

Judgment accordingly.

THE UNION HOTEL COMPANY, Appellant, v. THOMPSON
HERSEE, Respondent.

79 454
171 504

Where by the charter of a corporation the right is reserved to the Legislature to alter or repeal it, a subscriber to its capital stock is not discharged from his subscription by a subsequent amendment to the charter, but will be regarded as having consented to the change.

By plaintiff's charter (chap. 432, Laws of 1871) it was provided that the franchises thereby granted should become null and void unless it should begin the construction of a hotel within two years after the passage of the act; it was also made "subject to the liabilities and restrictions contained in certain provisions of the Revised Statutes," among others to the provision (1 R. S., 600, § 8) declaring that the charter of every corporation thereafter "granted by the Legislature shall be subject to alteration, suspension or repeal, in the discretion of the Legislature." Defendant subscribed for fifty shares of the capital stock. Subsequently, but before the expiration of the two years, the charter was amended (chap. 123, Laws of 1873) by extending the time for beginning the construction of the hotel five years. The work of construction was not commenced within the two years, and soon after defendant gave notice to plaintiff that he withdrew his subscription. In an action upon the subscription, *held*, that the said provision of the Revised Statutes was to be considered as incorporated in the charter, and as part of defendant's contract; and that the subscription was not defeated by the amendment.

In re B. W. and N. R. Co. (73 N. Y., 245). distinguished.

Defendant's subscription was made on the condition that "the sum of \$200,000 be subscribed by the citizens of Buffalo." The requisite amount was subscribed; some of the subscriptions were in firm names written by one partner; one was in the name of a corporation; it appeared that this was made by authority of the directors of the corporation, and with the assent of all the stockholders. Upon these sub-

Statement of case.

scriptions payments were made in compliance with calls made upon the subscribers. *Held*, that the evidence established *prima facie* the validity of these subscriptions; that, in any event, the payment upon each was a ratification thereof.

One of the subscribers had, at the time of his subscription, his domicile in Batavia, but boarded in Buffalo, was engaged in business and spent nearly all of his time there. *Held*, that he was a citizen of Buffalo within the meaning of the subscription papers.

Another subscription was in the name of "B. & S. M. Spencer." B. Spencer, who signed, was a resident of Buffalo. *Held*, that the subscription was within the terms of the contract; and this, although there was no such firm, or B, signed without authority, as in either event he would be liable as upon his individual subscription.

Un. H. Co. v. Hersee (15 Hun, 371), reversed.

(Argued December 15, 1879; decided January 13, 1880.)

APPEAL from order of the General Term of the Supreme Court; in the fourth judicial department, setting aside a verdict in favor of plaintiff, and granting a new trial. (Reported below, 15 Hun, 371.)

This action was brought upon a subscription by defendant to plaintiff's capital stock, to recover certain calls or assessments upon said subscription.

The facts appear sufficiently in the opinion.

Sherman S. Rogers, for appellant. Mr. Richmond was a citizen of Buffalo, within the meaning of the subscription. (§ 5, tit 2, art. 1, chap 13, pt. 1; R. E. [Edm. ed.], 362 [in. p.], 390; *Bell v. Pierce*, 51 N. Y., 12.) The lead company was estopped from denying its liability, and this estoppel made its subscription valid and binding. (*Whitney Arms Co. v. Barlow*, 63 N. Y., 62.) If the lead company was not bound as a corporation, its stockholders were bound individually. (Story on Agency, § 280.) The company was a citizen within the meaning of the subscription. (*Cook v. State Nat. Bank*, 52 N. Y., 110.) Defendant having intrusted to the corporators to ascertain who were citizens and stockholders is bound by their decision. (*Penobscot R. R. Co v. White*, 41 Me., 512, 521.) The Legislature had the right to pass the act of March 24, 1873 (chap. 123),

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amending plaintiff's charter. (*S. and S. Plank Road Co. v. Thatcher*, 1 Kern., 102; *B. and N. Y. City R. R. Co. v. Dudley*, 14 N. Y., 336.) The effect of not commencing construction within the statutory time rendered the franchise liable to a forfeiture which could be enforced only by the State. (*A. & A. on Corps.*, §§ 77, note 1.) If a forfeiture took place before trial this case is not affected, as it is provided by 2 Revised Statutes (Cothran's ed.), 392, section eleven, that a suit like the present shall not abate. (*Phol. W. Co. v. Badger*, 67 N. Y., 294.)

George Cleveland, for respondent. The subscription by the lead company was in excess of its corporate powers and invalid. (*McCullough v. Moss*, 5 Den., 567.) The construction of the hotel not having been commenced within the time fixed by plaintiff's charter it should have been nonsuited. (*People v. Manhattan Bank*, 9 Wend., 373; *In re B'klyn, W. and N. R. R. Co.*, 72 N. Y., 245; *Hartf. and N. H. R. R. Co. v. Croswell*, 3 Hill, 383; *Buff. and N. Y. C. R. R. Co. v. Dudley*, 2 Kern., 336, 355.) If the act of March 24, 1873 (chap. 123) did extend the time to commence five years, if nothing has yet been done towards it, plaintiff's corporate powers have ceased, and it has no standing in court. (*Britton v. Wickwire*, 54 N. Y., 226; *In re B'klyn, etc., R. R. Co.*, 72 id., 245; *Sturgis v. Drew*, 11 Hun, 136; affid. in Ct. of App.; *McCulloch v. Norwood*, 56 N. Y., 562.)

DANFORTH, J. The plaintiff was incorporated by an act of the Legislature, passed April 12, 1871, for the purpose of constructing and carrying on a hotel in the city of Buffalo. By this statute its capital stock was fixed at \$200,000. The business was to be managed by a board of directors, who were clothed with the powers usual in such cases, and among others that of "calling in subscriptions" to the stock of the company. It was made "subject to the liabilities and restrictions contained in title III, chapter

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18, part 1 of the Revised Statutes;" and it is declared by section seven of the act of incorporation that "the franchise thereby granted shall become null and void," unless "the corporation shall commence the work of constructing the hotel within two years from the passage of this act, and complete the same within four years from the time of commencing the construction thereof." Under date of April, 1871, the defendant subscribed for fifty shares of the capital stock of the company, at \$100 per share, "provided the sum of \$200,000 be subscribed by the citizens of Buffalo." On the 24th of March, 1873, section seven of the statute above referred to was amended so as to give "five" instead of two years within which to commence the construction of the hotel. On the 21st of May, 1873, the defendant gave notice to the plaintiff that he withdrew his name as a subscriber to the capital stock of the company. Subsequently the board of directors made two calls for portions of the subscriptions, amounting, in the defendant's case, to \$1,500; and these not being paid, this action was commenced on the 9th of February, 1876, for their recovery. Upon the trial it was conceded "that the plaintiff did not commence the work of constructing the hotel within two years from the passage of the act of incorporation," and questions were raised as to whether the condition upon which the defendant's subscription was made had been complied with. Those will be more specially stated hereinafter; but at the close of the case the defendant's counsel moved for a nonsuit on various grounds, in substance, first: "That the defendant was discharged from his subscription by the failure of the company to commence the work of constructing the hotel and completing it within the time prescribed in the first act of the Legislature incorporating the plaintiff;" second: "That the plaintiff had not proved that the subscribers to the capital stock of the company were citizens of Buffalo or residents of that city." A nonsuit was denied. The defendant asked to go to the jury on the question of the residence of the subscribers to the stock. This also was denied. The rulings were excepted

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to by the defendant. The trial court ordered a verdict for the plaintiff and directed the exceptions to be heard in the first instance at the General Term. It was there held that the nonsuit should have been granted upon the ground first stated; and also that the court should have complied with defendant's request to go to the jury. The verdict was therefore set aside and a new trial granted. In both particulars I think the learned court erred, and that the appeal now before us must be sustained. As to the first proposition, the General Term held, and such is the claim of the learned counsel for the respondent, "that the defendant's subscription was upon the terms and conditions provided by the act (of 1871) and the subscription paper; that the amendment passed in 1873 in no manner affected it," because it "was in the nature of a contract, and could not be altered without his assent." The premises may be conceded, but not the conclusion. For the act of 1871 by direct reference subjects the corporation to the liabilities imposed by the provisions of the Revised Statutes (*supra*); and section eight of that chapter declares that the charter of every corporation thereafter granted "shall be subject to alteration, supervision and repeal, in the discretion of the Legislature." The effect is the same as if this provision had been inserted in the plaintiff's charter. It is thus a part of the defendant's contract, and it is impossible to say that the alteration made by the amendment of 1873 was without his assent. Nor is the change organic. It leaves the end or purpose of the corporation as it is declared in the statute of 1871. It simply enlarges the time for its execution. It was held in *Agricultural Branch R. R. Co. v. Fitch Winchester* (13 Allen, 29), that subscriptions to the capital stock of a railroad company will not be defeated by a subsequent amendment of the charter extending the time for the completion of the road; and so in *Meadow Dam Co. v. Gray* (30 Me., 547). Both of these cases were decided under a special act incorporating into it by reference the provisions of a general statute to which all corporations were declared liable. In such cases,

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subscribers to the stock of corporations whose charters are liable to be so changed or altered must be regarded as consenting to the change. (*The Saratoga and Schenectady R. R. Co. v. Thatcher*, 11 N. Y., 102; *The Buffalo and N. Y. City R. R. Co. v. Dudley*, 14 id., 336.) In "*re Lee & Co.'s Bank*" (21 id., 1), the same question is discussed, under a clause in the charter reserving to the Legislature a right to alter and repeal it, and the conclusion reached that the subscriber to the capital stock of a company whose charter was amended was not thereby discharged from his subscription, but must be deemed a party thereto. I think, therefore, upon principle and authority, that the omission on the part of the plaintiff to comply with the terms of section seven in the act of 1871, as enacted, is not available to the defendant as an answer to the plaintiff's claim. The *Matter of B. W. and N. Railway Co.* (72 N. Y., 245), has no bearing upon the present case. The time within which, under its charter, original or amended, it could do any act, had expired before it undertook the proceeding which was under review. It was then an extinct corporation. In the case before us the time was extended before the expiration of the two years given by the act of 1871, and this action commenced before the expiration of that fixed by the act of 1873. Nor can the notice given by the defendant avail him. No such easy method of escape from liability is provided by the statute.

We are next to consider the effect of the subscription made by the defendant. His undertaking was not absolute, but upon condition, first, that \$200,000 should be subscribed, and second, that this subscription should be by citizens of Buffalo. By repeated exceptions upon the trial he insisted that the contingencies had not happened upon which his liability depended, and whether they had or not is the principal question on this appeal. As to the first, there is no difficulty. The subscription books disclose that the requisite amount was in fact subscribed, and the evidence was sufficient to establish the genuineness of the signatures of the subscribers. Testimony was given tending to that end, and

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thereupon the books were introduced in evidence, without objection from the defendant. They contained some subscriptions by individuals, others under names signifying a firm or company, and it was admitted by the defendant "that the personal signatures were genuine, and that the signature of any firm name was made by a member of the firm." That this concession was intended to cover the point now under consideration is rendered quite certain by the qualifying words following it, viz. : "but it was not admitted that S. M. Spencer, or Sidney Shepard, or The Cornell Lead Company, was a citizen of Buffalo, and no concession was made that the signature of any firm or corporate name was a valid subscription." This, I think, was enough to make a *prima facie* case, and in the absence of evidence by the defendant to show that any of the signatures were not genuine, was properly held to be conclusive.

Was it necessary for the plaintiff to go further and show by other evidence the validity of the subscriptions standing in a firm or corporate name? First. As to the firm or copartnership subscriptions. It was enough, in the first instance, to show the subscription in the firm name written by one partner, and its ratification in the manner hereafter stated. Second. The only corporate name upon the subscription books is "The Cornell Lead Company." It was placed there with the consent of all the stockholders and by authority of the directors, and although not entered upon the corporate books, it is none the less valid. Moreover, it appears from the uncontradicted testimony of Mr. Jewett, the president of the plaintiff, that calls were made upon all the subscribers to the capital stock, that all paid except five, who are named, and among whom are none of those whose subscriptions are now objected to as invalid. There is, then, a complete ratification by the reality of cash payments.

The objection most earnestly relied upon by the learned counsel for the respondent is, that the sum of \$200,000 was not subscribed for by citizens of Buffalo; and if this is so, the judgment appealed from must stand, notwithstanding

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the validity or even payment of the subscriptions so made, for the defendant thus qualified his promise. In order to answer the question now raised, we are to ascertain who were intended by the term "citizens of Buffalo." The word has more than one meaning, and must be taken in the sense which best harmonizes with the subject matter in reference to which it is used. With what object and intention, therefore, was it introduced into the contract? This inquiry accords with an accepted rule of interpretation, that "all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter or person :'' (*Bacon's Maxims of the Law, Regula X.*) By the definition usually given a citizen is "an inhabitant of a city, town or place," and so would include every person dwelling in the place named; but it is subject to various limitations depending upon the context in which it is found. It may indicate a permanent resident, or one who remains for a time or from time to time. That it has various meanings, according to the object in view, is well illustrated by different statutes in which it appears. An act which imposes the burden of making and repairing bridges on the "inhabitants," in the town or county in which they are situated, is held by that term to include all holders of houses and lands in the locality, whether resident or not, but as excluding actual dwellers who had no ratable property in the place, such as servants (*Rex v. North Curry* (4 B. & C., 953); and this agrees with the definition given by Jacobs in his Law Dictionary and adopted by ALLEN, Senator, in *The Matter of Wrigley* (8 Wend., 141), viz. : "He who hath a house in his hands in a town, may be said to be an inhabitant." But where a person occupied premises in one parish and carried on his business in person there, but resided in his dwelling-house in another, he was held not to be an inhabitant of the former parish, so as to be bound to serve as its constable. (*Rex v. Allard*. 4 B. & C., 772; *Rex v. Nicholson*, 12 East, 330.) A man may be domiciled in one place and be a resident in

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another, at the same time, as in the case of *Wrigley* (*supra*). His domicile was England, but he was said to be an "inhabitant" of New York while he transacted business there; and so in questions affecting the rights of creditors (19 Wend., 47); and those concerning taxation. By the Revised Statutes (tit. 2, p. 1, chap. 13, art. 1, vol. 1, p. 389, § 5) it is assumed that a person may reside in more than one place during the same period; and his residence, within the meaning of that section, is declared to be the county, town or ward in which his principal business shall have been transacted. This question is considered in *Bell v. Pierce* (51 N. Y., 12); and it is there shown that a man may be a resident of two places at one and the same time, and that "to establish a residence, requires a less permanent abode than to give a domicile, or even to create an inhabitation." In the case before us, the object of the subscription was to provide for the erection of a hotel; and this is well put by counsel in behalf of the respondent. It was, he says, "a project in which the business men of the city were pecuniarily interested," and the object of the respondent himself is stated by his learned counsel. He "desired," it is said, "that the hotel, which he expected and hoped the corporation formed for that purpose would build, and from the erection of which he calculated great pecuniary benefits in his business, should be under the control and management of his fellow townsmen — *men whose interests were in the same direction as his.*" This statement is warranted by the defendant's evidence as a witness. Now to promote this object it was not necessary or expected that the subscriptions should be by persons who were qualified voters in Buffalo. They would constitute one class of citizens, and for certain obvious purposes the only ones entitled to that name; and it is not unlikely that much local patronage of the hotel when erected would be drawn from that class. But the object was to erect the hotel, and, for that purpose, not only to procure the necessary funds, but at the same time to enlist the interest of the business men of Buffalo in the enterprise, so that, as far as possible, they

would be concerned in securing for it patronage, and contribute to its success. For that purpose, it would be immaterial whether the subscriber occupied with his family a house within the limits of the city, or outside of them, so long as his place of business was in Buffalo, and he had a permanent pecuniary interest in its welfare and in the success of the new house. In that view we must consider the objections pointed out by the exception taken to the subscriptions of Richmond and Spencer. Mr. Richmond resided, at the time of the trial, in Buffalo, but at the time of the subscription, had his house and legal residence in Batavia, Genesee county, and says: "I boarded in Buffalo, at the Tiff House. I spent nearly all my time in Buffalo. I was engaged in business there." His domicile, then, was Batavia; but that is in no respect inconsistent with the fact that his residence was in Buffalo. He was actually there the greater part of the time, and was permanently there for business purposes. He is within the definition adopted in *In re Thompson* (1 Wend., 45), viz.: "He who stops even for a long time in a place for the management of his affairs, has only a simple habitation there, but has no domicile." The signature of "B. & S. M. Spencer" was conceded to be genuine; and the objection at the trial was that S. M. Spencer was not a citizen of Buffalo. It is not claimed that Burrill Spencer was not, and thus the subscription is within the very terms of the contract; nor would it be otherwise, if, as the defendant claims, there was either no such firm, or Burrill signed without authority, for, in either of those events, he would be liable as upon his individual subscription.

It is not claimed upon this appeal that the want of citizenship applies to the subscription of Sidney Shepard & Co., of which firm Sidney Shepard was a member, or to that of the "Cornell Lead Company." I think that all of the subscriptions were, within the principle above alluded to, and within the intent and meaning of the contract, made by the citizens of Buffalo.

It is, however, contended by the respondent that the trial

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court erred in refusing to permit the jury to inquire, first, as to the residence of Richmond, Shepard and Spencer; and second, as to whether \$200,000 had been subscribed by the citizens of Buffalo. These questions are substantially the same, and if the conclusion arrived at, when considering the ground upon which the nonsuit was denied was correct, were properly withheld from the jury. In regard to neither, was there any dispute upon any essential fact, and so nothing for the jury to pass upon.

We are thus led to the conclusion that the case was well disposed of by the learned trial judge. Therefore the order of the General Term should be reversed and judgment absolute rendered for the plaintiff upon the verdict, with costs.

All concur.

Order reversed, and judgment accordingly.

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119	153
79	464
158	604
79	464
j 162	26
j 162	80
79	464
169	126

**WILLIAM STACKUS, Appellant, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Respondent.**

In an action for negligence, to justify a nonsuit on the ground of contributory negligence, the undisputed facts must show the omission or commission of some act which the law adjudges negligence; the negligence must appear so clearly that no construction of the evidence or inference drawn from the facts will warrant a contrary conclusion.

In an action to recover damages for injuries sustained by plaintiff in consequence of a collision at a highway crossing, plaintiff's evidence was to the effect that he was traveling westerly in a covered buggy with two spirited horses, upon a highway which crosses defendant's track at an acute angle, and for several rods east of the crossing runs near to and nearly parallel with the track. He was acquainted with the crossing, and the running of the trains; a train from the east was past due; plaintiff supposed it had passed, as while approaching the crossing he had heard a train going east, and if on time it would have passed. A train was about due from the west. When he came near to the sign-board warning travelers to look out for the cars, he stopped his team and looked east and west for trains; he could see about fifty rods east; seeing no train, he started on to cross the track, looking and listening both ways as much as he could without getting out, or off from his seat, but he neither heard nor saw anything. The train from the east struck

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plaintiff's buggy, and he was injured. Plaintiff was nonsuited on the ground of contributory negligence. *Held*, error; that the failure of the plaintiff to let down his buggy top when he started up, was not, as matter of law, negligence.

McCall v. N. Y. C. R. R. Co. (54 N. Y., 642), distinguished.

(Argued December 15, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth Judicial department, affirming a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been sustained by plaintiff through the negligence of the employees of defendant.

The facts are sufficiently stated in the opinion.

H. V. Howland, for appellant. All the circumstances should have been submitted to the jury, and from them the plaintiff had a right to ask a verdict that he was not guilty of contributory negligence. (*Myers v. Dixon*, 45 H. P. R., 48, 49; *Bernhard v. R. and S. R. R. Co.*, Abb. Ct. App. Dec., 131; *Weber v. N. Y. C. and H. R. R. R. Co.*, 58 N. Y., 451-455; *Massoth v. D. and H. C. Co.*, 64 id., 524-529; *Hill v. N. Y. C. and H. R. R. R. Co.*, 2 Weekly Digest, 94; affirmed 64 N. Y., 652; *McGovern v. N. Y. C. and H. R. R. R. Co.*, 67 N. Y., 417-421; *Girmce v. S. A. R. Co.*, 67 id., 596; *W. P. P. R. Co. v. Whipple*, 6 Weekly Digest, 60; *McCaully v. Mayor of N. Y.*, 4 id., 135.) The fact of plaintiff's going upon the track in a covered carriage was not, in itself, negligence. (*Ernst v. H. R. R. R. Co.*, 35 N. Y., 30; *Davis v. N. Y. C. and H. R. R. R. Co.*, 47 id., 400-402; *W. P. P. R. Co. v. Whipple*, 6 Weekly Digest, 60, 61; *Dolan v. D. and H. C. Co.*, 71 N. Y., 285-288.)

Daniel Pratt, for respondent. Where the evidence shows a clear case of contributory negligence on the part of plaintiff the court should nonsuit. Where facts are undisputed

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negligence, is a matter of law. (*Mitchell v. N. Y. C. and H. R. R. R. Co.*, 64 N. Y., 55; *Johnson v. Hudson R. R. R. Co.*, 20 id., 65; *Reynolds v. N. Y. C. and H. R. R. Co.*, 58 id., 4; *Davis v. Same*, 47 id., 400; *Wilcox v. R. and W. R. R. Co.*, 393 id., 358; *Groton v. Erie R. R. Co.*, 45 id., 660; *McCall v. N. Y. C. and H. R. R. R. Co.*, 54 id., 662; *Gibbon v. McMillen*, 5 Moore's [N. S.] P. C., 434; *Collon v. Wood*, 8 C. & P. [N. S.], 568; *Toomey v. Brighton Railway*, 693 C. B. [N. S.], 146; *Cornman v. Eastern Counties R. R. Co.*, 4 H. & N., 781; *Ryder v. Wormbly*, L. R. [4 Ex.], 32; S. C., 1 C. & P., 306.)

CHURCH, Ch. J. This case belongs to a class of cases of frequent occurrence. The amount involved is not so large as to render it important. The importance of the case arises chiefly, from the necessity of keeping the dividing line between questions of law which belong exclusively to the court, and questions of fact which belong to the jury to determine, well defined and understood. Upon the plaintiff's evidence it is not denied, but the jury would have been justified in finding negligence on the part of the defendant's agents and employees. The plaintiff was nonsuited upon the ground that he was guilty of negligence which contributed to the injury. To justify this, the negligence must appear so clearly that no construction of the evidence, or inference drawn from the facts, would have warranted a contrary conclusion, and that a verdict of the jury the other way, would have been set aside as against evidence.

In general, negligence is a mixed question of law and fact, and is to be determined by a jury. The cases where a nonsuit has been sustained on the ground of contributory negligence are exceptional, and are confined to cases where the undisputed facts show the omission or commission of some act which the law adjudges negligent. It is well settled that a person approaching a railroad crossing must exercise care and caution such as a prudent person would exercise to avoid danger. Whether such care has been exercised in a given

case, is usually a question of fact for the jury, to be determined from all the circumstances of the case. In this State it has been settled that a person desiring to cross a railroad track must exercise his senses of seeing and hearing to avoid danger, and an omission to do this has frequently been adjudged, as matter of law, negligence. The traveler must look both ways, and listen for the approach of trains. He is not obliged, however, as matter of law, to stop his team, to rise up in his wagon, or to get out and go to the track to make observations. Whether he ought to do any or all of these things in a given case, in order to relieve himself from the charge of negligence, is for the jury to decide in view of the circumstances developed. Care must be exercised commensurate with the danger to which a party is exposed, but the degree of care necessary to be exercised on a particular occasion is generally, of necessity, a question of fact.

The plaintiff was traveling westerly in a covered buggy, with two horses, in the winter, in a highway which crosses the track at an acute angle. The highway for several rods east of the crossing runs near to, and nearly parallel with the track. When he arrived at the sign-board warning travelers to look out for the cars, he stopped his team, and looked east and also west for trains, but saw none. He could see east about fifty rods from that point. He was acquainted with the crossing, and the running of the trains. He supposed the train from the east had passed, as he had heard a train going east at some distance back, and if on time, it would have passed. A train was also about due from the west, and did arrive just after the accident. In this condition of affairs, the plaintiff started his team to cross the track. He had a spirited team, and drove at the rate of about six miles an hour. In his evidence he says: "I started up, and kept looking and listening for the train both ways. Did you look both ways? Yes, sir, I looked and listened both ways, as much as I could without getting out of my wagon, or down off the seat. I kept looking and listening for the train, and saw nothing, and heard nothing."

The train from the east struck the wagon, and the plaintiff received some injury. In reviewing a nonsuit, the evidence is to be construed most favorably for the plaintiff. It appears that the plaintiff was exercising his faculties, he was in a state of watchfulness, he had stopped his team for the purpose of looking, and he did look and listen, and this is the distinguishing feature between the case at bar and the *McCall Case* (54 N. Y., 642), relied upon by the defendant. In that case the driver went to the crossing heedlessly, without thinking of it, or paying any attention to it, and the court properly held that he was negligent. Here the plaintiff was on the alert to avoid danger, and whether he adopted all the precautionary measures which the circumstances demanded from a prudent person, was a question for the jury. It is said that he should have let down his buggy top, so as to have enabled him to look east more easily, after he started from the sign-board. This was a precaution which would have been proper, but no court can say, as a matter of law, that it was indispensable. Such a precaution may or not be necessary. He had stopped his team and looked east, he had reason to suppose that the train had passed, or if not, that being out of sight when he did look, it could not reach the crossing before he had passed, or that he might hear it if it did. He may have erred in judgment. It is easy to see after an accident how it might have been avoided. If he had not stopped at all he would have passed in safety, and the very act which evinced his care and caution resulted in his injury. Conceding that if he had lowered his buggy top he would have seen the train, it does not necessarily follow that it was negligent not to lower it, and it is only in cases where the act or omission is negligent *per se*, that courts should assume to decide it as a question of law. The jury may determine that ordinary care and prudence demanded it. The fact that when he looked east he could only see about fifty rods, that a train then out of sight going at the rate of thirty miles an hour might overtake him at the crossing, that a head-wind might prevent his hearing a train from

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the east, the dangerous character of the crossing, and the attention necessary to guide his team, would warrant a jury in finding that a prudent man should have used the additional precaution of letting down his buggy top so that he could more easily see a train approaching from the east, and that if he had done so the accident would have been avoided, but no case has gone so far as to hold that an omission of such an act constitutes negligence in law. It depends upon all the circumstances, the situation and acts of the plaintiff, the character of the crossing, the situation of the road, the facility for seeing and hearing, the wind and weather, the construction of the evidence, and the credibility of witnesses. It is difficult to conceive of a question of fact more appropriate for the consideration of a jury than this. It is a question in respect to which men may differ. The learned judge who delivered the opinion at General Term upon the first appeal, expressed himself emphatically that it was a palpable case of negligence. It is not needful to say that this was error as a question of fact, but it seems to me clear that it cannot be so adjudged as a question of law. There is room, to say the least, for a difference of opinion, and a verdict either way would not be set aside as against evidence.

There are no two cases alike in circumstances, and therefore mere precedents are of little value, but the authorities, I think, clearly recognize and establish the distinction here indicated, between questions of fact and law. (*Massoth v. Delaware and Hudson Canal Co.*, 64 N. Y., 524-529; *Ireland v. Oswego, Hannibal and Sterling Plank Road Co.*, 13 id., 533; *Renwick v. New York Cent. R. R. Co.*, 36 id., 132; *Dolan v. Delaware and Hudson Canal Co.*, 71 id., 285, 288, 289; *Hill v. N. Y. C. and Hudson R. R. R. Co.*, 64 id., 652; *Davis v. N. Y. C. and Hudson R. R. R. Co.*, 47 id., 400.)

The judgment should be reversed, and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

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DENNIS NOONAN, Respondent, v. THE CITY OF ALBANY,
Appellant.

A municipal corporation has no greater right than an individual to collect the surface-water from its lands and streets into an artificial channel, and to discharge them upon the lands of another.

The right of a riparian proprietor to drain the surface-water on his lands into a stream which flows through them, is not an absolute one under all circumstances; it does not authorize the throwing into a small stream surface-water, by means of ditches and drains, when, by so doing, the stream will be filled beyond its natural capacity, will overflow and flood the lands of a lower proprietor.

Defendant, by means of sewers and the manner of grading of one of its streets, concentrated the surface-water and sewage of a large territory and discharged it in one body into a ravine. A small rivulet formerly ran down through this ravine. Defendant, with the consent of the proprietors, had changed this water-course by constructing a box-drain two or three feet square in its place. The water discharged, as aforesaid, into the ravine, passed over ground, used as a dumping place for refuse, and then down the ravine into the box-drain, and having no sufficient outlet flooded plaintiff's premises below and deposited thereon the filth carried by the sewers, and the sand and dirt washed down from the dumping ground. It did not appear that defendant owned any of the lands between the sewer and the water-course. In an action to recover the damages, *held*, that the facts established *prima facie* a cause of action; and that they justified a submission of the case to the jury.

It appeared that the box-drain was obstructed below plaintiff's premises, so that the water and sewage were prevented from passing therein, as it otherwise would; it did not appear that this was attributable to any act of plaintiff's, or for which he was responsible; he had no control over the drain below his premises. *Held*, that this did not constitute a defense; that plaintiff was not bound to protect himself from the illegal act of the defendant by removing or causing the removal of the obstruction.

Waffle v. N. Y. C. and H. R. R. Co. (53 N. Y., 11), distinguished

(Argued December 18, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of plaintiff, entered upon an order denying a motion for a new trial, and directing judgment on a verdict.

This action was brought to recover damages to plaintiff's premises, situate in the city of Albany, alleged to have been

79	470
125	356

79	470
127	268
127	594

79	470
162	590

79	470
169	78

79	470
171	1601

79	470
78	AD'518
78	AD'519

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caused by water, dirt and filth thrown and deposited thereon by the unlawful acts of defendant.

The facts appear sufficiently in the opinion.

R. W. Peckham, for appellant. Defendant had a right to drain the lands and streets drained by the sewer in the stream, if it was a natural water-course, and is not liable to plaintiff for damage caused by any increase in the amount of water thrown into said stream by such drainage. (*Wagner v. R. R. Co.*, 2 Hun, 633, 636; *Waffle v. N. Y. C. R. R. Co.*, 58 Barb., 413; *affid.*, 53 N. Y., 11-13; *Foot v. Bronson*, 4 Lans., 47; *Waffle v. Porter*, 61 Barb., 130-134; *Angel on Water-courses* [6th ed.], §§ 108-108s.)

E. Countryman, for respondent. Defendant is liable for the injury caused by the Lark street sewer to the property of the plaintiff. (*Conrod v. Ithaca*, 16 N. Y., 159; *Hickok v. Plattsburgh*, 16 id., 161-172; *Hutson v. Mayor, etc., N. Y.*, 9 id., 163; *Davenport v. Ruckman*, 37 id., 568; *Storrs v. Utica*, 17 id., 104; *Requa v. Rochester*, 45 id., 129; *Laour v. New York*, 3 Duer, 406; *Mayor v. Bailey*, 2 Den., 433; *Barnes v. Dist. Col.*, 1 Otto, 540; *Wightman v. Washington*, 1 Black., 39; *Jones v. New Haven*, 34 Conn., 1, 14; *Pittsburgh v. Grier*, 22 Penn., 54; *Bowning v. Springfield*, 17 Ill., 143; *Nevins v. Peoria*, 41 id., 506; *Springfield v. Le Claire*, 49 id., 474; *Aurora v. Reed*, 57 id., 29; *Pekin v. Brereton*, 67 id., 477; *Cotes v. Davenport*, 9 Iowa, 227; *Dayton v. St. Joseph*, 51 Mo., 570; *Mayor v. Henly*, 2 Clk. & Fin., 331; *Mersey Docks v. Gibbs*, L. R. [1 H. L.], 93; *Pendleburg v. Greenhalgh*, L. R. [1 Q. B. Div.], 36; *Bathurst v. McPherson*, L. R. [4 Ap. Cas.], 256.) The corporation is bound, even when acting for the public safety, to exercise its legitimate powers with the requisite care and skill to avoid unnecessary injury to individuals or their property. (*Babcock v. Buffalo*, 1 Shel., 217; 56 N. Y., 268; *Hicks v. Dorn*, 42 id., 47, 53; *Russell v. Mayor*, 2 Den., 461, 475; *Donohue v. Mayor*, 3 Daly, 65, 68; *Shepard v.*

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People, 40 Mich., 487, 492; *Brightman v. Bristol*, 65 Maine, 426.) A municipal corporation is not exempted from responsibility, where the injury is accomplished by a corporate act, which is in the nature of a trespass upon him. (*Ashley v. Port Huron*, 35 Mich., 296-301; *Thayer v. Boston*, 19 Pick., 511; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 id., 544; *Lee v. Sandy Hill*, 40 N. Y., 442; *Babcock v. Buffalo*, 56 id., 268; *Howell v. Buffalo*, 15 id., 512-519; *Boom v. Utica*, 2 Barb., 104-110; *Clark v. Mayor*, 13 id., 32; *Gilman v. Laconia*, 55 N. H., 130; *Inman v. Tripp*, 11 R. I., 520; *St. Peter v. Denison*, 58 N. Y., 416; *Hay v. Cohoes Company*, 2 id., 159; *Spencer v. Hartford, etc., R. R. Co.*, 10 R. I., 14; *Murphy v. Lowell*, 124 Mass., 564, 565; *Pettigrew v. Evansville*, 25 Wis., 223; *Hendershott v. Ottumwa*, 46 Iowa, 658.) The deprivation of the plaintiff of the beneficial use and enjoyment of his premises, by the act of the city authorities, was an appropriation of private property to public use, without compensation, within the prohibition of the constitution, and therefore illegal. (*Babcock v. Buffalo*, 1 Shel., 317; 56 N. Y., 268; *Pumpelly v. Green Bay Co.*, 13 Wall., 166; *Nevins v. Peoria*, 41 Ill., 503; *Shawneetown v. Mason*, 82 id., 337; *Columbus v. Woolen Mills*, 33 Ind., 435, 438; *Thurston v. St. Joseph*, 51 Mo., 511; *Inman v. Tripp*, 11 R. I., 520, 525; *Pettigrew v. Evansville*, 25 Wis., 223; *In re Cheeseborough*, 8 N. R. Wkly. Dig., 534; *People ex rel. Williams v. Hails*, 49 N. Y., 587, 590; *Eaton v. B. C. and M. R. Co.*, 51 N. H., 504; *Gardner v. Newburgh*, 2 Johns. Chy., 162; *Linnickson v. Johnson*, 17 N. J. L., 129.) A municipal corporation cannot by any means, or in any manner, create with impunity a public or private nuisance. (Hale's *Portibus Maris* [Hargrave's Law Tracts], 85; *Nichols v. Boston*, 98 Mass., 39; *Haskell v. New Bedford*, 108 id., 208-215; *Mootry v. Danbury*, 45 Conn., 550; *Nevins v. Peoria*, 41 Ill., 504; *Jacksonville v. Lambert*, 62 id., 519; *Babcock v. Buffalo*, 1 Shel., 317; 56 N. Y., 268; *Francis v. Schoellkopf*, 53 id., 152; *Jutte v. Hughes*, 67 id., 268; *Franklin*

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Wharf v Portland, 67 Maine, 46; *Bathurst v McPherson*, L. R. [4 Ap. Cas.], 256, 267.) A municipal corporation is not bound to furnish facilities to property owners for drainage, either of surface-water or sewage, not caused by its own acts to flow or to accumulate on their lots, but after deciding to undertake their construction the corporation acts ministerially, and is liable for any special injury sustained by others from the negligent or unskillful exercise of its authority in the construction of drains or sewers, or the failure to keep them in good repair. (*Rochester White Lead Co. v. Rochester*, 3 N. Y., 464; *Barton v. Syracuse*, 37 Barb., 292, 595; 36 N. Y., 54; *Nims v. Troy*, 59 id., 500-508; *McCarthy v. Syracuse*, 46 id., 194-196; *Lewensthal v. New York*, 61 Barb., 511; *Donohue v. New York*, 3 Daly, 65; *Reeves v. Toronto*, 21 N. C. [Q. B.], 157; *Clark v. Peckham, Treas.*, 9 R. I., 455, 458; *Dixon v. Baker*, 65 Ill., 518, 521; *Loganport v. Wright*, 25 Ind., 513.) If negligent, the municipality is liable to the same extent as any other corporation, or a public officer, or an individual for a similar injury. (*Bastable v. Syracuse*, 8 Hun, 587, 592; *Hickok v. Plattsburgh*, 16 N. Y., 161; *Robinson v. Chamberlain*, 34 id., 389-395; *Clark v. Peckham*, 9 R. I., 455-472; *Moran v. McClearns*, 63 Barb., 195, 198; *New York v. Furse*, 3 Hill, 612-615; *Rochester White Lead Co. v. Rochester*, 3 N. Y., 464, 469; *Babcock v. Buffalo*, 1 Shel., 317; 56 N. Y., 268; *Dixon v. Baker*, 65 Ill., 518-521; *Indianapolis v. Huffer*, 30 Ind., 235; *Barnes v. Columbia*, 1 Otto, 540, 551, 556.) The common council having decided to exercise the power conferred, and undertaken to build the sewers, was bound to bestow such care and skill that they should not become a nuisance to the property of persons residing in the neighborhood, or to other portions of the city. (*Rochester White Lead Co. v. Rochester*, 3 N. Y., 464, 469; *Donohue v. Mayor*, 3 Daly, 65, 68; *Boston v. Syracuse*, 37 Barb., 295, 296; 36 N. Y., 54, 55; *Nims v. Troy*, 59, id., 500-508; *Clark v. Peckham*, 9 R. I., 455, 460; *Indianapolis v. Huffer*, 30 Ind., 235; *Attorney-*

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Gen'l v. Leeds, L. R. [5 Chy. Ap.], 583; *Attorney-Gen'l v. Birmingham*, 4 Kay. & J., 528.) The city was clearly bound, if it undertook to construct the sewers, to see that they discharged their contents in such a manner as to carry them safely past the plaintiff's property. (*Lewenthall v. Mayor of New York*, 61 Barb., 511; *Woodward v. City of Worcester*, 121 Mass., 245; *Ruck v. Williams*, 3 Hurl. & Nor., 308.) It was palpable negligence on the part of the city to allow the mouth of the sewer to become obstructed by the dumping and filling. (*Child v. City of Boston*, 4 Allen, 41; *Barnes v. District of Columbia*, 1 Otto, 540, 566.) The city had no right to discharge the public sewers into a private water-course. (*Canal Proprietors v. City of Lowell*, 7 Gray, 223; *City of Columbus v. Woolen Co.*, 33 Ind., 535; *O'Brien v. City of St. Paul*, 18 Minn., 176; *Cone v. City of Hartford*, 28 Conn., 363; *Attorney-Gen'l v. City of Birmingham*, 4 Kay & J., 528; *Matter of Rhineland*, 68 N. Y., 105, 107; *People v. Haines*, 49 id., 587, 590.) It is immaterial whether the contents of the sewer were discharged and deposited directly on the plaintiff's premises, or at such a point that the sewage and other refuse, taken along with it, must necessarily be carried there by a conduit or by gravitation. (*Sleight v. City of Kingston*, 11 Hun, 594, 596; *Moran v. McClearns*, 63 Barb., 185; *Woodward v. City of Worcester*, 121 Mass., 245, 248; *City of Aurora v. Reed*, 57 Ill., 29, 32; *City of Jacksonville v. Lambert*, 62 id., 519; *Inman v. Tripp*, 11 R. L., 520, 523; *Clark v. Peckham*, 9 id., 455, 472; *Pettigrew v. Evansville*, 25 Wis., 236; *Henderschote v. Ottumwa*, 46 Iowa, 658.) Where the sewage and filth are accumulated, and the nuisance is created by the sole act of the city, causing special injury to private property, the ordinary rule does not apply, and the city itself is bound to afford the requisite facilities for drainage. (*Byrnes v. City of Cohoes*, 67 N. Y., 205; *Donohue v. Mayor of New York*, 3 Daly, 65, 68; *City of Aurora v. Reed*, 57 Ill., 30; *City of Dixon v. Baker*, 65 id., 518; *Van Pelt v. City of Davenport*, 42 Iowa, 308; *Ross v. City of Clinton*, 46 id.,

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606; *Sleight v. City of Kingston*, 11 Hun, 594; *Bradt v. City of Albany*, 5 id., 591; *Donohue v. Mayor of New York*, 3 Daly, 65; *Barrow v. City of Baltimore*, 2 Amer. Jur., 203; *Canal Proprietors v. City of Lowell*, 7 Gray, 223; *Haskell v. City of New Bedford*, 108 Mass., 208, 226; *Brayton v. City of Fall River*, 113 id., 218; *Boston Mills v. City of Cambridge*, 117 id., 396; *Woodward v. City of Worcester*, 121 id., 245, 248; *Richardson v. City of Boston*, 19 How. [U. S.], 263, 270; *Franklin Wharf v. City of Portland*, 67 Me., 46; *Rowe v. City of Portsmouth*, 56 N. H., 291; *Clark v. Peckham, Treas.*, 9 R. I., 455, 472; *Ashley v. City of Port Huron*, 35 Mich., 296; *City of Jacksonville v. Lambert*, 62 Ill., 519; *Elgin Co. v. City of Elgin*, 74 id., 433; *City of Columbus v. Woolen Co.*, 33 Ind., 435; *City of Indianapolis v. Larmer*, 38 id., 348, 369; *O'Brien v. City of St. Paul*, 18 Minn., 176; *South Bridge Co. v. Southhamton*, 8 El. & Bl., 801; 92 Eng. Com. Law R., 800; *Ruck v. Williams*, 3 Hurl. & Nor., 308; *Coe v. Wise*, L. R. [1 Q. B.], 711.) Surface-water, which formerly flowed through no defined channels, cannot be collected, by means of drains or ditches, or otherwise, into a single stream and discharged upon the lands of another. (*Bastable v. City of Syracuse*, 8 Hun, 587; 72 N. Y., 64; *Byrnes v. City of Cohoes*, 5 Hun, 602; 67 N. Y., 204; *Jutte v. Hughes*, 67 id., 268, 272; *Moran v. McClearns*, 63 Barb., 185, 198; *Foot v. Bronson*, 4 Lans., 47, 51; *Moran v. McClearns*, 63 Barb., 185, 196; *Waffle v. N. Y. C. R. R. Co.*, 58 id., 413; 53 N. Y., 11, 13; *Jutte v. Hughes*, 67 id., 268, 272; *Brayton v. City of Fall River*, 113 Mass., 208, 206; *Attorney-General v. Leeds*, L. R. [5 Chan. Ap.], 583.) The court properly charged that the plaintiff was under no obligation to drain off the sewage and water thrown upon his premises by the acts of the defendant. (*Goodale v. Tuttle*, 29 N. Y., 459, 466; *Rose v. N. Y. Gas-Light Co.*, 8 N. Y. Week. Dig., 463.)

ANDREWS, J. The defendant by means of the Lark street and connecting sewers, and the manner of grading Colonic

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street, concentrated the surface-water and sewage of a large territory, and discharged it in one body at the junction of Lark and Colonie streets into a ravine. It passed after its discharge over ground used as a dumping place for refuse, and down the declivity, until it reached the valley, or bed of the ravine, and flowing easterly, reached the premises of the plaintiff, and having no sufficient outlet, flooded the plaintiff's lot, and deposited thereon the filth carried by the sewers, and the sand and dirt washed down by the water as it passed over the dumping ground. This *prima facie* established a right of action in the plaintiff. A municipal corporation has no greater right than an individual to collect the surface-water from its lands or streets into an artificial channel, and discharge it upon the lands of another, nor has it any immunity from legal responsibility for creating or maintaining nuisances. (*Weet v. Village of Brockport*, 16 N. Y., 172, note; *Byrnes v. City of Cohoes*, 67 id., 204; *Haskell v. City of New Bedford*, 108 Mass., 208; *Attorney-General v. Leeds Corporation*, L. R. [5 Chy. App. Cas.], 583.)

The defendant sought to defend the injury to the plaintiff on two grounds, *first*, that it had the legal right to drain into a stream which flowed through the bed of the ravine across the plaintiff's land without responsibility for consequential injuries resulting to the plaintiff from such drainage, and that the water and sewage which flooded the plaintiff's premises were discharged into this stream, and *second*, that the injury was attributable to an obstruction of the channel of the stream below the plaintiff's lot, which prevented the water and sewage from passing therein, as it otherwise would have done. In support of the first proposition the defendant's counsel relies upon the decision of this court in *Waffle v. The New York Central Railroad Company* (53 N. Y., 11), in which it was held that the owner of lands upon a natural water-course, may collect, by means of ditches, the surplus water on his premises, and discharge it into the stream, although by so doing the flow of water therein at some seasons may be increased, and at other times, at

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periods of low water, by reason of the more rapid drainage, may be diminished, to the detriment of a mill-owner below. The right of a riparian owner to drain the surface-water on his lands into a stream which flows through them, and which is its natural outlet is an incident to his right as riparian owner to the reasonable use of the stream. But this right is not, we conceive, an absolute right under all circumstances, irrespective of the size of the stream, or the natural purpose which it subserves, to throw into it, surface-water by means of ditches or drains, when by so doing it will be filled beyond its natural capacity, and overflow and flood the lands of a lower proprietor. The stream into which the sewage and water collected by the defendant found its way, was a mere rivulet of water, the outlet of springs at the head of the ravine. It may also before the sewers were built, or Colonie street was graded, have received a portion of the surface-water from the territory drained thereby. But at that time the surface-water had no defined channel. It was subject to be disposed of by the ordinary processes of nature. Absorption and evaporation would diminish the amount which otherwise might have found its way to the valley, and the discharge into the stream of the portion not otherwise disposed of would naturally be gradual, and reach it at different points in its course. It does not appear that the city owned any of the land between the sewer and the water-course, but it had with the consent of the property owners changed the water-course from its natural condition, and constructed a box-drain two or three feet square in its place. In view of the character and capacity of this water-course, it cannot we think be held as matter of law that there was the right in the city to discharge into the stream the water from Colonie street, and from the Lark street sewer, although by so doing it would flood the premises of the plaintiff. It follows that the first request to charge, was properly refused. The request assumes that the city using reasonable care, had the absolute right to drain into the water-course in question, irrespective of the capacity of the stream or the amount

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of water discharged into it, and the court was requested to instruct the jury that it was not liable "for any damage caused by *any increase* in the amount of water thrown into the stream by such drainage."

The second ground upon which the reversal of the judgment is sought, is also we think untenable. The obstruction to the *creek-drain*, so called, was not so far as the evidence shows attributable to any act of the plaintiff, or any act for which he was responsible. The filth and material carried into it by the sewers, may and doubtless did contribute to choke and fill it. The plaintiff had no control over the drain below his premises. He was not bound to protect himself against the consequence of the illegal act of the defendant, by removing, or causing the removal of the obstruction. The casting on the plaintiff's premises of the filth from the sewers, was a nuisance, and the defendant was bound to abate it. Because the injury complained of would not have happened, or would have been diminished if the creek-drain had been unobstructed, does not relieve the defendant from legal responsibility.

We think the case was fairly presented to the jury, and that the judgment should be affirmed.

All concur.

Judgment affirmed.

AUGUSTUS PRENTICE et al., Respondents, v. MARY ANN JANSSEN et al., Appellants.

Where a will directs real estate to be converted into money, and the proceeds distributed, the parties entitled thereto may, if of lawful age, and if the rights of others will not be affected, elect to take the lands and prevent the actual conversion thereof into personalty

No distinct or positive act is required, a slight expression of intent will be considered sufficient to show an election.

The court has power, in an equitable action for partition, where the parties are tenants in common of real or personal estate, to direct a sale of the whole in one parcel, where the interests of the parties will be promoted by such sale.

79	479
114	102
79	478
116	246
79	478
189	220
79	478
144	569

79	478
170	1497

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The will of B. authorized his son F. to carry on the hotel business for five years, if he so desired, in a certain hotel owned by the testator; and empowered his executors to sell the hotel property, after the occupancy of his son had ceased, and divide the proceeds among his residuary legatees. F. died before the testator; no action was ever taken by the executors to sell the property. Three of the four legatees, or their successors in interest, conveyed their interests to plaintiff. Defendant M., the other legatee, joined with the plaintiff in making leases of the property; and large sums were expended by them in making improvements. In an action for partition, the only surviving executor was made a party defendant, as the husband of M.; he did not, by his answer, claim any rights as executor, or that he was a proper party as such. *Held*, that the executors took no interest in the lands, but merely a power in trust, to be executed simply for the purposes of distribution, liable to be defeated by a re-conversion into realty of the property which was converted by the will into personalty; that the parties beneficially interested had a right to elect to make such a re-conversion, and their acts showed such an election; that the power of sale thereby become extinguished, and the parties became owners as tenants in common, and so that a partition was proper; also that the surviving executor had no title, interest, or lien upon the property which rendered him a necessary party to the action as such executor; that the provision of the Revised Statutes (1 R. S., 735, § 107), which makes a power of sale a lien or charge upon land, had no application, as the power had ceased to exist; also that equity would not interpose to compel the execution of the power (1 R. S., 734, § 9C), as the purpose had been accomplished without its exercise.

The will gave various legacies; this action was commenced seven years after the testator's death; it did not appear that any debts or legacies remained unpaid. *Held*, that these facts did not make the executor, as such, a necessary party; that, as the debts and legacies are primarily to be paid out of the personalty, the presumption was that they had been paid, particularly as no such defense, as that they were unpaid, was set up in the answer or interposed on trial; also that the same presumption also existed as to testamentary expenses.

Crittenden v. Fairchild (41 N. Y., 289), distinguished.

C., one of the residuary legatees, died leaving a will, by which she authorized her executor, during the minority of the beneficiaries named in the will, to sell or lease jointly with the other owners of the undivided shares in the property. After one of the devisees became of age the executor conveyed to defendant M. all the interest and estate vested in him as such, in one of the lots, part of the hotel property. *Held*, that the deed was invalid and conveyed no title.

By the lease of the hotel property, executed by plaintiff and defendant M. as lessors, they were required to make all necessary repairs; plaintiff made the repairs and also erected a new building, M. acquiescing therein. *Held*, that the share of M. was properly chargeable with its proportion of the expenditures, so also of the costs.

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The hotel property consisted of four lots, not contiguous, but all used in carrying on the hotel business. The referee found that the real estate and the personal property, *i. e.*, the furniture, etc., in the hotel could not be sold in separate parcels without greatly depreciating its value, injuring the owners and violating the rights of the lessee; the judgment directed the whole to be sold in one parcel. *Held*, no error.

There were five residuary legatees named in the will; one of them was F., who died intestate, leaving no descendants. The pleadings admitted that the parties to the action were the sole owners of the real estate. *Held*, that this precluded an objection that an heir of F. had an outstanding interest and should have been made a party.

(Argued December 16, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment, entered on the report of a referee. (Reported below, 14 Hun, 548.)

The nature of the action and the facts are set forth sufficiently in the opinion.

C. Bainbridge Smith, for appellants. A decree for a partition cannot be made unless all the persons interested in the premises are made parties to the suit. (*Burhans v. Burhans*, 2 Barb. Ch. R., 398, 407; *Ripple v. Gilborn*, 8 How. P. R., 457; *Braker v. Devereaux*, 8 Paige, 513; 2 R. S., 218, § 5; 3 *id.* [Banks' 6th ed.], 584, § 8; Code of Procedure, § 448; *Croghan v. Livingston*, 17 N. Y., 225; *Hewlett v. Wood*, 62 *id.*, 75, 77.) The same rule obtains, as to a defect of parties, under the Code of Procedure and Code of Civil Procedure. (Code of Procedure, § 122; Code of Civil Procedure, § 452; *Shaver v. Brainard*, 29 Barb., 25, 27; *Vanderwerken v. Vanderwerken*, 7 *id.*, 221; *Valentine v. Wetherill*, 31 *id.*, 655; *Green v. Milbank*, 3 Abb. [N. C.], 138, 156.) Non-joinder of parties will render a judgment of sale void, as to those parties, and will justify a purchaser in refusing to take title. (*Alvord v. Beach*, 5 Abb., 451; *Rogers v. McLeon*, 10 *id.*, 306; *Burhans v. Burhans*, 2 Barb. Ch. R., 398, 407; *Ripple v. Gibbon*, 8 How., 456; 5 Wait's Practice, and cases cited; *Jordan v. Poillon*, 20 Alb. Law J., 74.) It is no answer

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to an objection of defect of parties that the defect was not taken advantage of by the defendants in their answer, or if such defect appeared upon the face of the complaint that they did not demur. (*Shaver v. Brainard*, 25 Barb., 25; *Vanderwerken v. Vanderwerken*, 7 id., 221; *Van Epps v. Van Dusen*, 4 Paige, 64, 76; *Greenleaf v. Queen*, 1 Peters' R., 137, 148; *Burhans v. Burhans*, 2 Barb. Ch., 398; *Van Epps v. Van Dusen*, 4 Paige, 75, 76; 10 N. Y., 521, 522, 549; *Greenleaf v. Queen*, 1 Peters' R., 137, 148; *King v. Donnelly*, 5 Paige, 46; 1 Barb. Ch. Pr., 320, 321; *Lord v. Underdunk*, 1 Sandf. Ch., 46, 51.) Gerhard Janssen, as executor of the last will and testament of Francis Blancard, has an interest in and lien upon the property in question, and he should be made a party defendant to this action, and this defect of parties may be raised, without setting it up in the answer. (Barbour on Parties, 439, *et seq.*; Edwards on Parties, 25; *King v. Donnelly*, 5 Paige, 46; 1 R. S., 729, § 56; 2 id. [Banks' 6th ed.], 1109, § 69; Willard on Real Estate and Con., 242, 249; 1 R. S., 735, § 107; id., 734, § 96; *Ford v. Belmont*, 7 Robt. S. C. R., 97, 111, 508; *Hertzell v. Barber*, 69 N. Y., 1, 363; *Crittendon v. Fairchild*, 41 id., 289; 1 R. S., 729, §§ 56, 107; *Young v. Brush*, 28 N. Y., 667, 673; 2 R. S., 327, § 63; 3 id. [Banks' 6th ed.], 594, § 77; 2 R. S., 109, § 57; 3 id. [Banks' 6th ed.], 12, § 75; *Stagg v. Jackson*, 2 Barb. Ch. R., 86; S. C., affirmed, 1 N. Y., 206; *Clark v. Clark*, 8 Paige, 152, 157; Willard on Executors, 421; 2 R. S., 218, § 5; Code of Proc., § 122.) It was not enough to make him a party defendant, as the husband of his wife. (*Austin v. Moore*, 47 N. Y., 360; *Darrin v. Hatfield*, 1 Seld. Notes, 38; 4 Sandf. S. C. R., 468.) Charles Blancard, a son of the testator, should have been made a party defendant in this action. (*Van Beuren v. Dash*, 30 N. Y., 393; *Gill v. Brower*, 31 How. Pr., 540; S. C., affirmed, 37 N. Y., 631; *Johnson v. Johnson*, 12 Rich. Eq., 259; *Wilkins v. Earle*, 44 N. Y., 192.) The Pavilion Hotel property had been converted into personalty, by the will of Francis Blancard, before the death of Caro-

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line, and she had no power or authority to reconvert it into realty. (*Oxendon v. Lord Compton*, 2 Ves., 69; Leigh & Dalzell on Eq. Con., [5 Law Lib.], 89; *Smith v. Kearney*, 2 Barb. Ch. R., 533-551; *Graham v. Dickenson*, 3 id., 169; *Couch v. Delaplaine*, 2 N. Y., 397.) When a possession has once been held or taken *eo nomine*, as a tenant in common with others, it may afterward become adverse, and it becomes so when the co-tenant has notice that the holding is adverse. (Freeman on Cotenancy and Part., § 229, 242; *Zeller's Lessees v. Eckhert*, 4 How. U. S. R., 289, 295.) A subsisting adverse possession is an absolute bar to an action of partition. (*Florence v. Hopkins*, 46 N. Y., 182-184; *Garret v. White*, 3 Iredell's [N. C.] R., 131.) The testimony was not sufficient to justify a sale of the real estate in one parcel; and there is no authority to order a sale of the premises unless the court shall be satisfied that any distinct lot, tract, or portion thereof is so situated that a partition cannot be made without great prejudice to the owners. (2 R. S., 323, § 37; 3 id. [Banks' 6th ed.], 590, § 46; *Tucker v. Tucker*, 19 Wend., 226; *Fleet v. Dorland*, 11 How. Pr., 490.) The court is not restricted to a partition of the whole, but may partition part and sell the remainder. (*Haywood v. Judson*, 4 Barb., 223; 71 Rule of Supreme Court.) It seems that a court of equity has power to decree a partition of personal property, or a sale thereof, where partition is impracticable, and order a division of the proceeds; but the court has no power to sell such personal property, with realty, in one parcel. (*Tinney v. Stebbins*, 28 Barb., 290; *Fobes v. Shattuck*, 22 id., 568; *Tripp v. Riley*, 15 id., 333; *Channon v. Lusk*, 2 Laus., 213.)

Joshua M. Van Cott, for respondents. The executors took nothing but a power in trust. (*Hertzell v. Barber*, 69 N. Y., 1; *Embury v. Sheldon*, 68 id., 233; *Chittenden v. Fairchild*, 41 id., 289; *Kinnier v. Rogers*, 42 id., 531; *Skinner v. Quin*, 43 id., 99; *Heermans v. Robertson*, 64 id., 332; *Bruner v. Meigs*, 64 id., 506; *Moncrief v. Ross*, 50 id., 431; *Acker-*

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man v. Gorton, 67 id., 63; *Stevenson v. Lesley*, 70 id., 513; *Jennings v. Conboy*, 73 id., 230; *Moncrief v. Ross*, 50 id., 431; *Manice v. Manice*, 43 id., 304.) The testator, by the direction to the executors to sell it, converted the real estate into personal, out and out. (Leigh & Dalzell on Eq. Con., [5 vol. of Law Lib.], m. p., 168; *Hertzell v. Barber*, 69 N. Y., 1, 11; *Multon v. Brigg*, L. R. [1 Ch. Div.], 385; 1 Jarman on Wills, 523, *et seq.*) As those who were absolutely entitled to the proceeds, if a sale had been made by the donees of the power, could themselves sell, and did sell, to the plaintiff; and as no purpose of the will required a sale, the power was thereby extinguished. (*Hertzell v. Barber*, 69 N. Y., 12, 14; *Jackson v. Jansen*, 6 J. R., 73; *Sharpsteen v. Yillow*, 3 Cow., 651; *Reed v. Underhill*, 12 Barb., 113; *Garvey v. McDewitt*, 72 N. Y., 556, 563.) If the objection that the action is defective in respect of parties, can be first taken on an appeal, it may be answered by the production of record evidence which refutes it. (*Dacey v. Moyer*, 72 N. Y., 70, 79.) The executor was not a necessary party, as there was no evidence that any debt or legacy remained unpaid when this action was brought. (*Kinnier v. Rogers*, 45 N. Y., 534; *Van Vechten v. Keator*, 63 id., 52; *Beran v. Cooper*, 72 id., 317; *Jennings v. Conboy*, 73 id., 230-237.)

MILLER, J. The complaint in this action demands an equitable partition or sale of several pieces of land therein described, upon a portion of which was erected a hotel, called the Pavilion Hotel, together with the personal property, consisting of furniture in said hotel, and that an account be taken of the disbursements and expenditures made by the plaintiff, Augustus Prentice, for the benefit of and as additions to said property, and that the share of the defendant, Mary Ann Janssen, be charged upon the same and deducted from her portion of the proceeds of the sale of the property. The land belonged to Francis Blancard at the time of his decease in 1868, and the title is derived under the provisions of his last will and testament. The plaintiff, Augustus Prentice,

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holds three-fourths, by conveyances from the residuary legatees or their representatives, and the defendant, Mary Ann Janssen, the remaining one-fourth. The defendant last named has joined with the plaintiff in making leases of the property since 1873; large sums have been expended in making improvements by the owners, and the rents have been received and applied in part, if not entirely, for that purpose.

The residuary clause in the will of Francis Blancard devised and bequeathed his property to five of his children, among whom were Francis H. Blancard and the defendant, Mary Ann Janssen. It also authorized Francis H. Blancard to carry on the hotel business in the Pavilion Hotel, for the term of five years, if he so desired, and the executors were empowered and directed, after the testator's death, to sell and convert into money all the real and personal property of which he should be seized or possessed, including the hotel property, after the right of occupancy of his son had ceased, as they should deem advisable, and divide the proceeds equally among the residuary legatees. The son, Francis H., died before the testator, and no action was ever taken by the executors to sell the property, and it remained undisposed of, and was used and regarded by the owners as real estate to which they had title. Only one of the executors, the defendant, Gerhard Janssen, was living at the time of the commencement of this action, and he is made a party, as the husband of the defendant, Mary Ann Janssen, and does not by his answer claim any rights as executor or that he is a proper party as such. The answers admitted that plaintiff and the defendant, Mrs. Janssen, owned the property as tenants in common. We think that under the provision cited from the testator's will, the executors who were donees of a power took no estate in the lands as trustees, but merely a power in trust to be executed for the purposes of distribution, according to the will, which was liable to be defeated by a reconversion of the property, which was made personal by the will, into real estate.

The testator, by the authority and direction to his executors to sell the real estate, constructively converted the same into personal estate, and, being thus converted, the residuary legatees were entitled to take the same as such and had a right at their election to reconvert into real estate. No distinct and positive act is required for such a purpose, and the rule applicable to such a case is that "in the reconversion of real estate, a slight expression of intention will likewise be considered sufficient to demonstrate an election on the part of those absolutely entitled:" (Leigh & Dalzell on Eq. Conversion [5th vol. of Law Library], m. p., 168; *Mutlow v. Bigg*, L. R. [1 Chan. Div.], 385; 1 Jarman on Wills, 523, *et seq.*) The real estate was not disposed of by the executors under the provisions contained in the will, and as there was no lawful purpose for which a sale was absolutely required, there was no obstacle to prevent a reconversion of the same by the parties in interest from personal into real estate. This they elected to do by positive and unequivocal acts. Three of the four residuary interests were conveyed to the plaintiff, Augustus Prentice, and the defendant, Mary Ann Janssen, retained the other one-fourth. The whole has since been enjoyed, possessed and treated the same as real estate. This was done by the acquiescence of the executors and all the parties in interest, not only by possession, but by acts showing their intention beyond any question. In Story's Equity Jurisprudence (§ 793), it is said that if land is directed to be converted into money merely, the party entitled to the beneficial interest may, if he elects so to do, prevent any conversion of the property and hold it as it is. This has been done by the residuary legatees here; and as the lands were not sold and disposed of by the executors, and no diversion made, the rule applies that the person entitled to the money, being of lawful age, can elect to take the land, if the rights of others will not be affected by such election. (*Hetzel v. Barber*, 69 N. Y., 1, 11.) No rights of other parties were injured by the election to reconvert; and as three-fourths of the residuary interests had been sold

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and conveyed to the plaintiff by those who were entitled to the proceeds of a sale, if one had been made under the power, and the owner of the remaining one-fourth had assented to the reconversion, by exercising acts of ownership, and the purpose of the power had become unattainable, the power to sell became extinguished, and the plaintiff and defendant already named became owners as tenants in common. (*Hetzel v. Barber, supra; Garvey v. McDevitt*, 72 N. Y., 563.) Neither the will itself nor the surrounding circumstances evince in any way that the testator intended not only to confer a power of sale, but that the exercise of such power would become absolutely necessary to enable the executors to make the distribution required to the residuary legatees, within the principle laid down in *Crittenden v. Fairchild* (41 N. Y., 289, 292), which is relied upon by the defendant's counsel. The facts here are far different from the case cited. The distribution was actually made and the purpose of the will fully accomplished by the reconversion of the personal estate into real estate by the parties in interest, as is quite obvious, and each of the legatees had received their full share as directed; thus rendering the exercise of the power of no avail. It follows that the executors having only a power to sell for the purpose of distribution — which power never was exercised, and which became of no use, by reason of the reconversion of the land into realty — Gerhard Janssen, the surviving executor, had no right, title, interest, or lien upon the property, which rendered him a necessary party to the action as such executor. The provision of section 107 (1 R. S., 735), which makes a power of sale a lien or charge upon the land, has no application when it had ceased to operate, and was of no practical use. As by the reconversion no interest remained in the executors, there could be no lien or charge upon the land. Equity would not interfere to compel the execution of the power under 1 Revised Statutes, page 734, section 96, because the purpose had been accomplished without its exercise.

Nor was it necessary that Gerhard Janssen, the surviving

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executor should be a party for any other reason. In regard to the payment of debts and legacies there was no evidence that any debt or legacy remained unpaid when this action was brought. Seven years had then elapsed, and as debts and legacies are primarily to be paid out of the personal estate, unless express directions or a clear intent to the contrary is found, or to be gathered from the will (*Bevan v. Cooper*, 72 N. Y., 317; *Kinnier v. Rogers*, 42 id., 531), the presumption is that they have been paid. The burden of proof was on the defendants to establish that they were not, if such was the fact. No such defense was set up in the answer or interposed upon the trial, and as the case stood the plaintiff was not required to show that the debts and legacies had been paid. The same remarks will apply to the point made, that there was no payment or accounting for the testamentary expenses.

Charles Blancard, a son of the testator, was not, we think, a necessary party defendant in this action. By the will he is bequeathed the sum of \$5,000, and he is not named therein as a residuary legatee. It is claimed that he became entitled to an interest in the residuary portion of the estate which was given by the testator to his brother Francis, who died before the testator, without leaving any child or descendant, and that the share bequeathed and devised to Francis lapsed and his share descended to the testator's heirs at law, that Charles Blancard was one of them and, therefore, a necessary party to the action. Without considering the question whether the devise to Francis H. Blancard having lapsed it passed, under the residuary clause, to the four children named who survived him, or whether the papers produced upon the argument of this appeal, showing that Charles Blancard had sold and conveyed away all the interest which he may have had in the property, and, therefore, was not a proper and necessary party to the action, it is sufficient to say that the point does not arise upon the record before us, and it is a complete answer to the objection that the admission made by the pleadings, that the plaintiff and the defend-

ant are the sole owners of the real estate, dispensed with the production of evidence upon the trial to establish such fact and preclude the objection that Charles Blancard had an outstanding interest as an heir at law, under the residuary clause in the will of Francis Blancard.

No title was acquired by the deed from Wemple, as executor of Caroline Blancard, deceased, of the interest of the decedent in one of the lots of the Pavilion Hotel, to the defendant, Mary Ann Janssen. Nor is there any valid reason why Mrs. Janssen should be subrogated, in this action, to his rights because the real estate had been converted into personality. By the will of Caroline Blancard the executor was authorized and empowered, during the minority of the nephews and nieces of the testatrix, to whom she had given one-half of the property, to sell or lease jointly with the other owners of the undivided shares therein. After one of the devisees became of age the executor conveyed to Mrs. Janssen all the interest and estate vested in him as such. He had no estate in the premises, and only a power in trust, which was to be executed while the devisees were in a minority in connection with the other owners. He had, therefore, no authority to execute the conveyance to Mrs. Janssen, and the deed was invalid and conferred upon her no title. Subsequently Mr. Wemple, as special guardian of one of the devisees who was an infant, by order of the court conveyed all of her interest under the will of Caroline Blancard, including that which had been previously attempted to be conveyed to Mrs. Janssen, to the plaintiff, Augustus Prentice, and by other conveyances the interest of the other devisees was acquired by him. As the executor had no authority to convey the premises, the right acquired by the deed of the special guardian could not be affected by the knowledge of the purchaser of the conveyance to Mrs. Janssen.

We think that the share of Mrs. Janssen was properly chargeable with its proportion of expenditures made by Augustus Prentice, the plaintiff, for repairs and improve-

ments of the property. By the lease \$5,000 was to be applied for improvements and repairs. It was supposed that they would not exceed that amount; but the covenant to make repairs was properly construed by the referee to mean that the lessors were to make all repairs, whether they exceeded the sum named or not. It also appears from the referee's findings that Mrs. Janssen after she had knowledge that the repairs exceeded the sum specified, assented to the appropriation of additional sums due for rents, to be used in making improvements; that she stood by and did not object to the erection of a new building, and she thus acquiesced in all the expenditures actually made. Under such circumstances there certainly was an implied obligation that she should pay her share of the moneys expended for the benefit of the property in which she had a common interest, and they are a proper charge against the defendant's portion of the real estate sought to be partitioned or sold. In making the repairs the plaintiff, Augustus Prentice, did not occupy the position of a volunteer, without any authority of his cotenant, but acted under the lease, which, as we have seen, covered the amount actually expended, and that this was done with the assent and approval of the defendant. The case of *Taylor v. Baldwin*, (10 Barb., 582, 626), which is relied upon by the defendant's counsel is not adverse to the views expressed.

There is no valid objection to charging the defendant's share of the proceeds of the sale with the amounts expended, as found by the referee. These expenses were incurred in reference to the property under special circumstances which, we think, render it chargeable therewith, and the judgment properly provided for the payment of defendant's proportion out of her share of the avails realized upon a sale. Nor is any reason shown why she should not be charged with her share of the costs, as found by the referee.

There was no error in the allowance of the architect's fees. Although there is some confusion in the referee's report in regard thereto, it nevertheless appears from the receipts intro-

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duced in evidence that the amounts charged in the account were actually paid to him.

We think the court properly ordered that the sale of the real estate and the personal property should be made as one parcel. The real estate as the referee found was so situated that a sale of one portion would interfere materially with the value of the remainder, and the personal property, being purchased for the benefit of the hotel, was of such a character that it could be disposed of more advantageously by a sale with the real estate than by a separate sale. No reason, therefore, exists why the sale of the whole real and personal estate should not be made together in a single lot. We have examined the authorities cited by the defendant's counsel upon the question last considered, and none of them sustain the position that the court has not the power, in an equitable action, where the parties are tenants in common of real and personal property, to direct a sale of both in one parcel when their interest will be promoted by such a sale.

There was no error, and the judgment should be affirmed.

All concur.

Judgment affirmed.

ANSEL A. MORGAN, Respondent, v. BENJAMIN F. SCHUYLER,
Appellant.

Plaintiff and defendant were formerly partners in business, as dentists, under the firm name of "Morgan & Schuyler." Upon the dissolution of the firm defendant bought plaintiff's interest in certain firm property, and became equitable assignee of the unexpired term of the lease of the room occupied by the firm, in which he continued the business, using signs bearing his name, followed by the words "successor to Morgan & Schuyler." There was nothing in the agreement of dissolution prohibiting plaintiff from engaging in the business, and it was understood at the time between the parties that he was to open an office for that purpose in another part of the city, which he did. In an action to restrain defendant from using plaintiff's name, *held*, that defendant did not acquire, by the agreement of dissolution, any good will in the business,

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except such as was incident to his sole ownership of partnership property, and his exclusive right to occupy the rooms of the late firm; that he was not authorized to use the firm name, or to declare himself "successor to" the late firm; and that, therefore, the action was maintainable.

It seems, that defendant would have the right to describe his rooms as those formerly occupied by "Morgan & Schuyler," and himself as formerly, or late of that firm.

(Argued December 17, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, denying a motion for a new trial, and affirming an interlocutory judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain defendant from using the name of plaintiff upon signs, circulars or advertisements, or from declaring himself to be the successor of the late firm of Morgan & Schuyler.

Prior to October 3, 1876, the parties were partners, as dentists, carrying on the business of dentistry under the firm name of "Morgan & Schuyler," in office-rooms in the city of Rochester. On that day they dissolved by written agreement, defendant purchasing certain partnership property, and assuming the rent of the rooms so occupied by the firm, which he was to continue to occupy. It was understood that plaintiff was to open another office in the same city; this he did. The firm used signs containing the firm name. After the dissolution plaintiff removed his name from the signs. Defendant replaced the name as nearly as possible, as before, and then placed over the firm name upon the sign the following, "B. F. Schuyler, successor to," in letters so small and in such a way as to be nearly imperceptible. A judgment was directed granting to plaintiff the injunction sought, and requiring defendant to remove the name of plaintiff from his signs and advertisements, and a reference was directed to ascertain plaintiff's damages. Judgment was entered accordingly.

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J. C. Cochrane, for appellant. By the agreement of dissolution the good will of the firm passed to defendant. (High on Injunctions, § 686; *Dougherty v. Van Nostrum*, 1 Hoff. Chy. R., 70; *Mussdeman's Appeal*, 62 Pa., 81.) The firm name was a part of the good will, and defendant could bring an action to restrain plaintiff from using it. (*Dayton v. Wilkes*, 17 How. R., 510; Story on Part., § 99; *Churton v. Douglas*, 1 H. R. V. Johnson's R., 174; *Williams v. Wilson*, 4 Sandf. Chy., 379; High on Injunctions, § 686; *Hall v. Hall*, 20 Beav., 14; *Banks v. Gibson*, 34 id., 568.)

John S. Morgan, for respondent. If defendant, by retaining the occupancy of the rooms, had the benefit of the good will appertaining thereto, still he acquired no right to use the plaintiff's name. (*Crutwell v. Lye*, 17 Ves., 346; *Austen v. Boyd*, 4 Tur. [N. S.], 721; Story's Partnership, § 99; *Schackle v. Baker*, 14 Ves., 468; *White v. Fones*, 1 Robt., 331; *Davies v. Hodgson*, 25 Beav., 177; *Howe v. Searing*, 6 Bosw., 354; *Austen v. Boyd*, 4 Tur. [N. S.], 719; Collyer on Partnership, 264 [m. p.]; *Peterson v. Humphrey*, 4 Abb. Pr., 394; Upton's Trademarks, 64; *Scott v. Scott*, 16 Law Times R. [N. S.], 143.) As defendant did not use plaintiff's name in good faith, he was properly enjoined from using it in such a manner as to mislead or impose upon the public, and supplant or injure the plaintiff. (Opinion herein of HARDIN, J., at General Term [fols. 167-173]; 3 Kent's Commentaries, 64, note *g*; Coddington's Trademarks, § 810; Story on Partnership, § 100; *Hookham v. Pottage*, L. R. [5 Chy.], 91 [1872]; *Glenny v. Smith*, 11 Fur. [N. S.], 964; *Bell v. Locke*, 8 Paige, 75; *Knott v. Morgan*, 2 Keen, 213; *Colton v. Thomas*, 2 Brewster [Pa.], 308; *Hogg v. Kirby*, 8 Vesey's Tr., 215; *Diez v. Lamb*, 6 Rob., 538; *Christie v. Murphy*, 12 How. Pr., 77; *Howard v. Henriques*, 3 Sandf., 725; *Woodward v. Lazar*, 21 Cal., 448; *Millington v. Fox*, 3 Mylne & Craig, 338; *Smith v. Cohn*, 5 Abb. [N. C.], 274; *Devlin v. Devlin*, 69 Me., 212; affg., 4 Hun, 657; *Meneely v. Meneely*, *supra*; *Meriden Brit. Co. v. Parker*, 39 Conn.,

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450; *Croft v. Holloway*, 13 Beav., 209.) The defendant has no right to retain and use the old signs of the firm. (Upton on Trademarks, 62.) Assuming that the defendant purchased all the property of the firm, still he did not acquire the right to call and advertise himself as the "successor" of the old firm. (*Reeves v. Denicke*, 12 Abb. Pr. [N. S.], 92; *Scott v. Rowland*, 26 Law Times R. [N. S.], 391; *Morse v. Hall*, 109 Mass., 409; *Bowman v. Floyd*, 3 Allen, 76; *Kennedy v. Lee*, 3 Merival, 452; *Lathrop v. Lathrop*, 47 How. Pr., 532; Code de Commerce, art. 21; Troplong sur le Droit Civile, Tome, 12, 372; *Scott v. Rowland*, 26 L. T. R. [N. S.], 391.)

DANFORTH, J. There was nothing in the former relations of the parties, or the express terms of the agreement of dissolution which gave to either one the good will of the business theretofore conducted by them under the firm name of "Morgan & Schuyler," nor was either in any way restrained from continuing the practice of his profession on his own account in any place. Yet the defendant became the equitable assignee of the unexpired term of the lease under which the firm held its place of business, and the sole owner of certain partnership property and fixtures. He thereby acquired an advantage over the plaintiff, for he had the exclusive right to occupy the rooms of the late firm, and as incident thereto, the benefit of that good will, which Lord ELDON defines, in *Crutwell v. Lye* (17 Vesey, 335), "as the probability that the old customers will resort to the old place." The extent of this depends partly upon the force of habit, and in the case of such business as had been carried on by these parties in some degree upon the satisfaction which the patient had received at the hands of one or the other member of the firm, but it is after all a very different thing from the good will which may be said to attach to the person of a professional man, as the result of confidence in his skill and ability. The first is of no value except to the occupant of the place *Clussum v. Dewes* (5 Russell, 30), while the latter is insepa-

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nable from the person, and follows its possessor wherever he goes. So far as it belonged to the plaintiff, it could not have been transferred to the defendant, but the advantage secured to him as the occupant of the old place of business, would doubtless have been rendered more valuable if the plaintiff had retired, not only from the firm, but from the practice of his art. This, however, he not only did not undertake to do, but it was understood by both parties at the time of dissolution, that the plaintiff was at once to open an office, and carry on his business of dentistry, in the same city. This fact precludes the idea that the defendant acquired any good will in the business, except such as was incident to his sole ownership of the property, mentioned in the agreement. It is evident, therefore, that it was not the intention of the parties that the defendant should in the conduct of his business, in any manner use the plaintiff's name either in combination with his own, as "Morgan & Schuyler," or in subservience to it, by declaring himself "the successor" to that firm. It is not claimed that there is any express contract to that effect, and none can be implied, either from the language of the agreement actually made, or from any fact or circumstance connected with it.

The case was argued by the learned counsel for the appellant, with much ingenuity, but I do not think that the cases cited by him sustain the appeal. On the contrary in *Dougherty v. Van Nostram* (1 Hoff. Chy., 70); *Musselman & Clarkson's Appeal* (62 Penn. St., 81); *Williams v. Wilson* (4 Sandf. Ch., 379), the good will in question was that only which pertained to the place of business, and no case holds that the good will included the right to a continued use of the name of the firm. Indeed in such a case, the retiring partner would have given up the advantages, but remained liable to the risks and burdens of business, for if his name continued upon the signs or other advertisements of the firm he would be bound to every one who gave credit thereto, in ignorance of the real state of the case, and liable for all debts contracted in the firm name. The injury in such

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a case is obvious. Nor has the defendant any better right to declare himself the "successor of" the firm of "Morgan & Schuyler." In so doing he represents not only that the firm is extinguished, but that his co-member has quit, or retired from business. The latter therefore will lose the patronage to which he is entitled, for those persons who might otherwise resort to him for assistance will be misled into supposing that his services cannot be obtained. In either aspect the plaintiff's case was made out. It does not follow, however, that the defendant may not avail himself of the full value of his purchase, and to that end by signs and advertisements refresh the memory of those customers who had acquired a preference for the particular locality in which he continues business, or recall to their attention the circumstance to which that preference might be due. He may lawfully describe the rooms as "formerly occupied by Morgan & Schuyler," and himself as "formerly" or "late" of that firm, by these or other phrases. He would thus state simply facts, belonging to his own life, or incident to the office, as much so as the time or place of his birth, the name of his father, or instructor, the college from which he graduated, or the time when the premises were first used in the practice of his calling. All this might be done in good faith. What has been done is quite different, and apparently for another purpose, without right, and to the plaintiff's injury.

The conclusion of the court below, was, I think, correct, and the judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

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WILLIAM W. WATROUS, Respondent, v. PATRICK KEARNEY
et al., Appellants.

An order punishing for contempt, in violating an injunction, can only be reviewed, upon the merits or for alleged legal error, on appeal from the order.

It is within the discretion of the court whether to open or vacate the order on motion, and the exercise of this discretion cannot be reviewed here.

Where a party has been brought into court on attachment, in proceedings to punish for contempt, he may be represented by attorney in the subsequent proceedings.

An order punishing defendants for contempt was granted by default. On motion to vacate the order, it was alleged, in the moving papers, that the attorneys who appeared for the defendants in the proceedings had no authority. The attorney, who appeared on return of the attachment, made affidavit that he was authorized; the defendants were also personally present; the same attorney appeared before the referee, to whom it was referred, to take proofs. Notice of motion for final order was served on, and service admitted by, attorneys who had appeared for defendants in the action, and who had also admitted service of the referee's report. *Held*, that as the attorneys thus undertook to represent defendants, the mere allegation of want of authority so to do did not invalidate the order.

(Submitted December 17, 1879; decided January 13, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, affirming an order of Special Term, which denied a motion on the part of defendants, Kearney and Littybridge, to vacate and set aside an order imposing upon them a fine for contempt in violating a temporary injunction herein. (Reported below, 11 Hun, 584.)

The facts appear sufficiently in the opinion.

Edward K. Clark, for appellants. An order or judgment taken by default is not appealable. (*Flake v. Van Wagener*, 54 N. Y., 25; *Gelston v. Hoyt*, 13 J. R., 561; *Innes v. Purcell*, 58 N. Y., 388; Code Civil Proc., § 1294.) This court should reverse the order so that the Supreme Court may pass

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upon the merits. (*Brown v. Brown*, 58 N. Y., 609; *Tilton v. Beecher*, 59 id., 176.) The injunction was void, the county judge having no jurisdiction to grant it, and not being subject to contempt. (Supreme Court Rule, 94 of 1870; *Town of Middletown v. The Rondout and Oswego R. R. Co.*, 43 How., 481; 1 Crary's Special Proceedings [2d ed.], pp. 176, 177; *People v. Sturtevant*, 9 N. Y. [5 Seld.], 263-266; *Deming v. Corwin*, 11 Wend., 647, 652; *Kamp v. Kamp*, 59 N. Y., 216.) These proceedings being distinct from the action, the service on the attorneys, who appeared, of the notice to confirm the referee's report, and impose a fine, was irregular. (*Sudlow v. Knox*, 7 Abb. [N. S.], 411.)

Stephen C. Millard, for respondent. An order punishing a party to an action as for contempt, by imposing a fine for the indemnity of the adverse party injured, by his refusal to obey the order of the court, is appealable to the Court of Appeals. (*Sudlow v. Knox*, 7 Abb. [N. S.], 411.) The county judge had jurisdiction to grant this injunction. (Code, §§ 218, 223, 225; *Rice v. Ehle*, 55 N. Y., 518; *Winston v. English*, 14 Abb. [N. S.], 124.) The county judge had authority in the premises. (*Harold v. Hefferman*, 42 How., 241; *Hathway v. Warner*, 44 id., 161; *Kennedy v. Simons*, 1 Hun, 603, 604.) Service upon defendants' attorney was sufficient. (*Webb v. Bailey*, 54 N. Y., 164; 40 id., 137, 335, 338, 340; *Erie Railway Co. v. Ramsey*, 45 id., 637.)

RAPALLO, J. The order appealed from affirmed an order of the Special Term denying a motion by the appellants to set aside or open an order imposing upon them a fine for contempt in violating an order of injunction. The motion was founded on allegations that the order was erroneous in various respects, and also that attorneys had appeared for the appellants without their authority, in the attachment proceedings. The attorney who appeared on the return of the attachment makes affidavit that he was authorized by the

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appellants so to do, and it seems that they were personally present at the time, and the same attorney appeared for them on the subsequent proceeding before the referee to whom it was referred to take proofs. In so far as the motion is founded upon the merits, or upon alleged legal errors, those can only be brought before this court by appeal from the the final order. To this the appellants answer that they could not appeal from the final order because it was entered on default. It appears however that it was entered on notice to Messrs. Smith, Bancroft & Moak, who had not only appeared for the appellants in the action, but who had as their attorneys admitted service of a copy of the referee's report and of notice of the motion thereon for the final order. They thus undertook to represent them on that motion, and the mere allegation of want of authority to do so does not invalidate the order. The appellants having been personally brought into court on the attachment, they could be represented by attorney in the subsequent proceedings. The plaintiff's proceedings to punish for the alleged contempt appear to have been regular and it was discretionary with the court below whether or not to open or vacate the order on motion.

The appeal should be dismissed with costs.

All concur.

Appeal dismissed.

THE NATIONAL BANK OF GLOVERSVILLE, Respondent v.
JOHN E. WELLS, Impleaded, etc., Appellant.

In an action upon a promissory note of \$2,400, it appeared that the note was indorsed by defendant W. for the accommodation of the makers, of which fact plaintiff had notice. The note was delivered by the makers to plaintiff's cashier, who indorsed it, and at their request procured it to be discounted by another bank, plaintiff receiving a compensation for procuring the discount. On, or prior to, the day the note fell due, the makers delivered to plaintiff another note, being one of several

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indorsed by W., and delivered to the makers to take up the note in suit, and other notes previously indorsed by him; plaintiff's cashier was directed to apply the proceeds to take up the paper so indorsed. It did not appear that this direction was revoked. The proceeds were credited to the makers. It did not appear that plaintiff, at that time, held any paper so indorsed by W., save the note in suit, which it had taken up. A few days after, the makers drew a check on, and delivered it to, plaintiff for \$2,731.62, payable to "notes, etc., or bearer." No money was paid the drawers thereon, and it did not appear that the proceeds of the note had been drawn out. *Held*, that the plain inference from the transaction was that the check was given to pay the note in suit, and that it was paid thereby; and that, in the absence of any proof rebutting this presumption, a finding of non-payment was error.

It seems, that a national bank has no power to loan its credit and become an accommodation indorser of a promissory note.

National Bank of Gloversville v. Wells (15 Hun, 51), reversed.

(Argued December 17, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 15 Hun, 51.)

This action was brought upon a promissory note of \$2,400, dated August 9, 1875, made by W. R. & R. D. Burr, payable two months from date to the order of defendant Wells, and indorsed by him for the accommodation of the makers.

The referee found that said note, on or about the 11th day of August, 1875, was delivered by the defendants Burr to the plaintiff's cashier, for the purpose of having it discounted; that it was thereupon indorsed by the said cashier and sent by him to the First National Bank of Albany, to be by it discounted, and said bank received and discounted the same at the usual rate of seven per cent, and remitted the proceeds to the plaintiff on or about the 16th day of August, 1875; that the plaintiff applied the proceeds to the payment of notes held by it against the makers by their direction; that the plaintiff demanded and received, as a consideration for procuring the discounting thereof, and for the loan of its credit by indorsing the same, the sum of \$14.67; that on the 12th day of October, 1875, when the said note became due, it was

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duly presented for payment, which was refused, whereupon it was duly protested for non-payment, and was subsequently taken up by plaintiff; that on the 4th day of October, 1875, the defendants Burr made their three several promissory notes, all payable four months after date, and to the order of the defendant Wells, one bearing date September 15, 1875, for the sum of \$2,000; one dated October 4, 1875, for the sum of \$2,500; one dated October 9, 1875, for the sum of \$2,000, and presented the same to the defendant Wells, who indorsed the same for their accommodation; that such indorsement was made by the said Wells for the purpose and with the direction given to the defendants Burr, that said notes should be used exclusively to pay and take up the said note for \$2,400, upon which this action is brought, and two other notes of \$1,000 each, then lying in the plaintiff's bank, and one other note of about \$2,000, lying at some bank in the city of New York, of all of which the said defendants Burr were the makers and defendant Wells the indorser; that the defendants Burr, on the said 4th day of October, 1875, negotiated and delivered the first two of said notes to the plaintiff, and the same were discounted by the plaintiff at the request of said Burr, who applied \$1,000, the proceeds thereof, to the payment of one of the said \$1,000 notes, and the balance to the payment of notes and liabilities of theirs, other than the said \$2,400 note and the remaining \$1,000 note; that on a subsequent day the defendants Burr delivered to the plaintiff the remaining \$2,000 note, so indorsed by defendant Wells, for the purpose of having it discounted, and the plaintiff procured it to be discounted at the First National Bank of Albany, which remitted the proceeds thereof to the plaintiff, and the plaintiff placed the same to the credit of defendants Burr, in their account with the plaintiff on its books, on the 26th day of October, 1875, and the same were subsequently paid by the plaintiff upon the check of the defendants Burr, drawn on the 3d day of November, 1875; that the plaintiff had no notice that the defendant Wells had indorsed the said three notes, or either

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of them, for any special purpose, or had placed any restriction upon the use to be made of them, or either of them, and, as a conclusion of law, found that plaintiff was entitled to recover.

The facts appearing upon trial, so far as essential, are set forth in the opinion.

Samuel Hand, for appellants. Plaintiff having had in its hands sufficient funds, which were equitably applicable to pay the note, the law will so apply them, although no application of them was made by the depositors. (*Allen v. Parson*, 3 Den., 284; *Seymour v. Van Slyke*, 8 Wend., 416; *Pattison v. Hull*, 9 Cow., 747; *Crocker v. Whitney*, 71 N. Y., 161.) The transaction in relation to the note being in excess of plaintiff's powers, the note was void, and plaintiff cannot recover. (*In re Jaycox*, 12 Blatch., 127; *Fowler v. Scully*, 72 Pa., 456; *Crocker v. Whitney*, 71 N. Y., 161; *Bank of Genesee v. Patchin Bank*, 13 id., 309, 314; *Crocker v. Whitney*, *supra*; *Farmers' Bank v. Baldwin*, Thompson's Bank Cases, 639.) Although a national bank does not forfeit a loan by taking usury, a note already tainted with usury is as invalid in its hands as in those of any other holder. (*Williams v. Storm*, 2 Duer, 52; *Clark v. Sisson*, 4 id., 408; *Munn v. Company*, 15 J. R., 44.) The transaction, in regard to this note, was not intended to be a loan of money, and was not a discount or a negotiation of a promissory note, within the meaning of the national currency act, and the after acquirement of it was an out an out purchase, *ultra vires*, and the bank acquired no title to, and cannot recover on it. (*First National Bank of Rochester v. Pier-son*, Thompson's National Bank Cases, 637; 16 Albany Law Journal, 319; *Farmers and Mechanics' Bank v. Baldwin*, 23 Minn., 198; *Weckler v. The First National Bank of Hagers-town*, 20 Amer. R., 102, 103; N. Y. Weekly Dig. for May 13, 1878, vol. 6, No. 11, p. 251.)

A. D. L. Baker, for respondent. The taking of the five per cent for the negotiation of the notes did not make the

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transaction usurious. (*Chatham Bank v. Betts*, 37 N. Y., 356; *Van Duesen v. Howe*, 21 id., 531; *Elwell v. Chamberlain*, 31 id., 611.) The referee having found that the proceeds of the notes made October 4, 1875, were used to pay other notes than the one in suit, and that this was done under the direction of Burr, and that the plaintiff had no knowledge of the instructions given by the defendant Wells to Burr, the plaintiff is a *bona fide* holder of the note. (1 Abb. Dig., 467, and cases cited; 1 id., 468; 23 Barb., 18; 4 id., 304; *Horbeck v. Craft*, 4 Duer, 122; *Ballard v. Borgett*, 47 Barb., 646; *Lamb v. Grover*, 47 id., 317; *Hodge v. Lansing*, 35 N. Y., 136; *Howard v. Lansing*, 35 id., 136; *Howard Banking Co. v. Welchman*, 6 Barb., 281.)

ANDREWS, J. The referee finds that the three notes made by the Burrs on the 4th day of October, 1875, were indorsed by the defendant Wells, for the accommodation of the makers to take up other notes for about the same amount previously indorsed by him, and with the understanding and direction to the Burrs when the indorsements were made, that the notes should be used by them to pay and take up the prior paper. This paper consisted of four notes made by the Burrs, viz.: two notes of \$1,000, each, discounted and held by the plaintiff; one of \$2,000, held by a New York bank, and the note of \$2,400, upon which this action is brought. One of the \$1,000 notes was past due; the other matured on the eighth of October. The \$2,000 note was also to mature in a short time. The \$2,400 note was dated August 9, 1875, and became due October 12, 1875. The Burrs within a few days after its date delivered it to the plaintiff's cashier, who indorsed it, and at their request procured it to be discounted by the First National Bank of Albany, the plaintiffs receiving from the Burrs as a compensation for procuring the discount, and for the loan of its credit, by indorsing the paper, a sum equivalent to five per cent per annum, on the amount of the note. The Albany bank discounted the note at the usual rate, and the result of

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the transaction was that the Burrs paid at the rate of twelve per cent per annum for the money received on the discount of the paper. The \$2,400 note was protested, and soon after was taken up by the plaintiff, and this action was subsequently brought thereon. The plaintiff at the time of the indorsement by the defendant Wells, of the notes made October 4, 1875 held in addition to the paper already mentioned, notes of the Burrs past due, indorsed by one Johnson. Johnson failed a few months after that date, and the inference from the evidence is, that he was then irresponsible. The Burrs after obtaining the indorsement of Wells upon the paper of the fourth of October, on the same day in violation of their agreement with Wells and of his direction to use the paper only for the purpose of retiring the paper upon which he was already liable as indorser, delivered two of the notes amounting in the aggregate to \$4,500 to the plaintiff who discounted them, and by the direction of the Burrs applied about \$3,500 of the proceeds to the payment of the Johnson paper held by the bank, and the balance to pay the past due note of \$1,000, indorsed by Wells.

It is undisputed that so far as the notes were used to take up the Johnson paper, it was a clear diversion of them from the purpose for which they were indorsed, and a fraud upon the defendant Wells. It was a controverted question on the trial, whether the bank when it took this paper was informed or knew of the special purpose for which it was indorsed, or of the restriction placed by Wells upon its use. The referee finds that the bank had notice that Wells was an accommodation indorser of this paper, as well as of all the paper then held by or which had passed through the bank. The Burrs testified that the plaintiff's cashier was informed when the two notes were discounted, that the notes upon which Wells was indorser, were to be paid out of the proceeds of the discount. This was denied by the cashier. The circumstances certainly might naturally have suggested to the bank, that Wells being accommodation indorser on the paper of the Burrs,

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some of which was lying over past due, and the balance of which was about maturing, intended that the new paper should be used for the purpose of retiring the outstanding paper upon which he was liable. But the referee has found adversely to the defendant Wells on the question of notice, and we cannot interfere with this finding. Wells has paid all the paper indorsed by him on the fourth of October. The bank has thus been enabled contrary to the intention of Wells to secure the payment by him of the Johnson paper, practically unsecured, and with which Wells had no connection, to the amount of \$3,500.

But the question remains whether the note in suit was not paid in whole or in part by the subsequent transaction between the Burrs and the bank. The third of the notes indorsed by Wells on the fourth of October for \$2,000, was received by the plaintiff from the Burrs' on or after the fifth of October, and the plaintiff procured it to be discounted on its indorsement, and the proceeds were credited to the Burrs' account in the bank, on the twenty-eighth of October. The precise day on which the bank received this note is not found by the referee, and is left by the evidence in doubt. The defendant R. D. Burr testifies that he left it with the acting cashier on the fifth of October with directions to apply the proceeds towards taking up the Wells paper, and informed him at that time that the balance lacking for this purpose, he would have at the bank by the twelfth. The acting cashier denies positively that this note was left with him on the fifth. He admits that Burr brought paper to the bank on that day, but says he took it away with him. The cashier of the bank testifies that he presumes the note was left at the bank on the twelfth. That, it will be observed, is the day on which the note in suit would become due. The precise day the bank received the note is not perhaps very material. But I do not understand that there is any denial in the case of the testimony of Burr that he informed the acting cashier when he left the note, that the proceeds were to be applied to take up the Wells paper. There is no evidence

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that this direction was ever revoked. The proceeds of this note, as has been said, were credited to the Burrs on the twenty-eighth of October. It does not appear that at that time the bank held any paper of the Burrs except the note in suit. The second \$1,000 note held by the bank was paid. The time of payment does not distinctly appear, but it does appear that it was not paid out of the avails of this discount. On the third of November, the Burrs drew a check on the plaintiff for \$2,731.62, payable to "notes, etc., or bearer." No money was paid the drawers, and the plain inference from the transaction is that it was given to pay obligations held by the bank against them. The proceeds of the discount of the note credited to the Burrs on the twenty-eighth had so far as appears never been drawn out, and were still liable to their draft, when the check of November third was drawn. The plaintiff gave no proof to rebut the natural inference from the circumstances that this check was intended to pay the note in suit. The note of October fourth from which the credit to the Burrs on the twenty-eighth was derived, was indorsed by the defendant Wells for the express purpose of taking up this paper. The Burrs when the note was delivered to the plaintiff, directed that the proceeds should be so applied. In the absence of evidence of any right in the plaintiff to make a different application, or of any different application in fact, we think the presumption is that the note in suit was paid by the check of November third, and that the issue of payment should upon the facts presented have been found in favor of the defendant Wells. The case does not very clearly present the exception raising this question, but it was assumed on the argument that it was involved, and I am of opinion that it can properly be considered under some of the exceptions to the findings, and refusals to find made by the learned referee.

The counsel have elaborately argued another question, viz.: whether a national bank can loan its credit, and become an accommodation indorser of a promissory note.

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If material to the decision of this case I should have no hesitation in denying this proposition. Such a transaction as is here disclosed on the part of the plaintiff, is clearly outside of its corporate powers. If a bank may charge a compensation for loaning its credit, and procuring another bank to discount the paper of its customers, it would practically abrogate all restraints imposed by the usury clauses, in the national bank act. It will be easy, if the practice can be sustained, for banks, by a course of friendly and reciprocal dealings, to obtain from needy borrowers under the guise of commissions for indorsing, any rate of interest which they may see fit to exact. But it is unnecessary to decide whether this matter constitutes a defense.

The judgment must be reversed on the ground that the evidence unexplained, established a payment of the note in suit, and I think the proper conclusion is to reverse the judgment and grant a new trial as to all the defendants.

All concur.

Judgment reversed.

79	506
120	6
79	506
121	69
79	506
124	649
79	506
133	585
134	476
79	506
144	883

THE STANDARD OIL COMPANY, Respondent, v. THE AMAZON INSURANCE COMPANY, Appellant.

This court can only review judgments and grant new trials for errors of law; and such errors must be pointed out by exceptions taken at a proper time.

Where, therefore, it is alleged that a verdict is perverse, excessive in amount, and contrary to the law and the evidence, the judgment entered thereon cannot be reviewed here without an exception.

This rule has not been changed by the provision of the Code of Civil Procedure (§ 999) in reference to the granting of a new trial by the judge presiding at the trial.

For such errors, *it seems*, the General Term has power to grant a new trial in its discretion, although no exceptions were taken on the trial.

In an action upon a policy of fire insurance, it appeared that when the issuing of the policy was reported to defendant by its agent, it at once notified him to cancel the policy, unless the "average clause" was inserted; this notice did not reach the agent until after the fire. On

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the trial defendant's counsel asked one of its witnesses whether "an average clause in a policy is favorable or unfavorable to an insurance company." This was objected to and excluded. *Held*, no error.

(Argued December 18, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff and affirming an order denying a motion for a new trial. (Reported below, 14 Hun, 619.)

This was an action upon a policy of fire insurance.

It appeared on the trial that the policy was issued by defendant's agent in New York, who reported it to the home office in Ohio. By the policy defendant had the option to cancel it; it telegraphed to its agent to cancel it, unless the "average clause" was inserted; this telegram was not received by the agent until after the fire.

The further facts appear in the opinion.

Samuel Hand, for respondent. There being no exceptions, there was nothing for this court to review, (*Oldfield v. N. Y. and H. R. R. Co.*, 4 Kern., 310; *Godfrey v. Johnstown*, 1 Keyes, 556; *McClune v. Cain*, 2 id., 203; *Dain v. Wyckoff*, 18 N. Y., 45; *Cady v. Allen*, 18 id., 573; *Metcalf v. Baker*, 57 id., 662.) If Peck regarded the fact of approval as really material, he was put upon the duty to inquire. (*Long v. Warren*, 68 N. Y., 426; Kerr on Fraud, 85 [Bump's ed.].) Disaffirmance of a contract for fraud must be prompt upon knowledge of the facts. (*Bruce v. Davenport*, 1 Abb. Ct. App. Dec., 233; *Wheaton v. Baker*, 14 Barb., 594; *People v. Stephens*, 71 N. Y., 529; *Proudfoot v. Montefiore*, L. R. [2 Q. B.], 511.) One cannot accept or claim the benefits of a contract made by an agent without ratifying and adopting the conditions and representations upon which it was made. (*Baker v. Ins. Co.*, 43 N. Y., 283; *Elwell v. Chamberlain*, 31 id., 611.)

Henry L. Burnett, for appellant. A new trial will be granted upon motion when there have been serious misdirec-

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tions, even, although, no exception was taken at the trial. (Graham & W. on New Trials, *262; *Boyden v. Moore*, 5 Mass., 365; *Penfield v. Rich*, 1 Wend., 380; *Lawrence v. Barker*, 5 id., 301; *Alger v. Duncan*, 39 N. Y., 313; 2 Tidd's Pr., 863; *Doe v. Roberts*, 2 Chitty, 272; *Adams v. Andrews*, 15 Q. B., 1001; *Crotty v. Rice*, 15 id., 1003n; *Bunnell v. Greathead*, 49 Barb., 106; *Benedict v. Johnson*, 2 Lans., 94; *Lattimer v. Hill*, 8 Hun, 171; *Archer v. Hubbell*, 4 Wend., 514; *Wehle v. Haviland*, 42 How. Pr., 399; *Cowles v. Watson*, 14 Hun, 41; *Sheldon v. H. R. R. Co.*, 14 N. Y., 218; *Macy v. Wheeler*, 30 id., 235; *Highland Bank v. Wynkoop*, Hill & Denio, 243; *Harris v. Wilson*, 1 Wend., 511; *Wardell v. Hughes*, 3 id., 418; *Coyle v. City of Brooklyn*, 53 Barb., 62; *Carnes v. Platt*, 6 Robt., 270; *Alexander v. Barker*, 2 C. & J., 133; *Cotteran v. Hindle*, 2 L. R. [C. P.], 368; *Delafield v. Illinois*, 2 Hill, 159; *Cook v. Whipple*, 55 N. Y., 150, 157.) The charge was erroneous, because it declares that a positive affirmative false statement upon the part of Lord was necessary to vitiate the policy. (Phillips on Ins., 537; Story on Contracts, § 506; *Schinder v. Heath*, 3 Camp., 506; *Moen v. Heyworth*, 10 M. & W., 155; *McFarran v. Taylor*, 3 Cranch, 280; *Dagget v. Emerson*, 3 Story, 732; *Mason v. Crosby*, 1 W. & M., 342; *Roosevelt v. Fulton*, 2 Cow., 134; *Bowery Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend., 359; *Bennet v. Judson*, 22 N. Y., 238; *Dennison v. Thomaston Ins. Co.*, 20 Me., 125; *Lobdell v. Baker*, 2 Mct., 201; *Sawyer v. Coastw. Ins. Co.*, 6 Gray, 221; *Leeds v. Wakefield*, 10 id., 508; *Giles v. Madison Ins. Co.*, 2 N. Y., 44; *Barteau v. Phoenix Ins. Co.*, 67 id., 595; Phillips on Ins., 542; May on Ins., § 209; *Bowery Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend., 359; *Valton v. National Fund Ins. Co.*, 20 N. Y., 32; *Ritt v. Washington Co.*, 41 Barb., 353, 358; *North American Fire Ins. Co. v. Throop*, 22 Mich., 146; *Wakeman v. Dalley*, 51 N. Y., 27; *Sibbald v. Hill*, 2 Dow. P. R., 263; *Valton v. National Fund Co.*, 20 N. Y., 32, 37.) A new trial will be granted when a verdict is perverse. (*Sweetman v. Prince*, 62 Barb.,

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256; *McDonald v. Walter*, 40 N. Y., 551, 553; *Salva v. Law*, 1 Johns. Cas., 337; *Wilkie v. Roosevelt*, 3 id., 206; *Rogers v. Murray*, 3 Bosw., 254, 252; *Ayres v. O'Farrel*, 4 id., 668; *Clark v. Richards*, 3 E. D. Smith, 89; *Alger v. Duncan*, 39 N. Y., 313.) James Lord's statements, whatever their form, were false. (*Fitzsimmons v. Joslin*, 21 Vt., 129; Wharton on Agency, § 170; 2 Pars. on Con. [5th ed.], 778, 779; *Stiti v. Huidekopers*, 17 Wall., 384, 393; *Todd v. Hardie*, 5 Ala., 698; *Pool v. Devers*, 30 id., 672, 677; *Johnson v. State*, 14 Ga., 55; *Hepburn v. Bank*, 2 La. Ann., 1007; *Ralph v. Chicago, etc.*, 32 Wis., 177, 181; *Standard Oil Co. v. Triumph Ins. Co.*, 3 Hun, 591; affd., 64 N. Y., 85; Pars. on Con. [5th ed.], 778.) The verdict was for too large in amount. (*Green v. Mayor*, 4 Robt., 675.) There was no evidence to sustain the verdict and this is ground for a new trial. (Graham & W. on New Trials, 362 *et seq*; *Halpin v. Third Avenue R. R. Co.*, 8 J. & S., 177; *Sharkey v. Torrilhon*, 7 Hun, 343; *Alger v. Duncan*, 39 N. Y., 313; *McDonald v. Walter*, 40 id., 551; *Stettiner v. Granite Ins. Co.*, 5 Duer, 594; *Townsend Mfg. Co. v. Foster*, 51 Barb., 356; *Shearman v. Henderson*, 12 Hun, 170; *Cheney v. N. Y. Cent. R. R. Co.*, 16 id., 415.) The refusal to grant a new trial was error of law reviewable in this court. (*Wright v. Hunter*, 46 N. Y., 409; *Sands v. Crooke*, 46 id., 564; *Dickson v. Broadway R. R.*, 47 id., 507; *Downing v. Kelly*, 48 id., 433; *Dickson v. Broadway R. R.*, 47 id., 507; *McDonald v. Walter*, 40 id., 551; *East River Bank v. Kennedy*, 4 Keyes, 279-286; *People v. McKinney*, 52 N. Y., 374, 383; *Briggs v. N. Y. C., etc., R. R.*, 72 id., 26; *East-erly v. Barber*, 66 id., 433; *Heyne v. Blair*, 62 id., 19; *Wilson v. Maltby*, 59 id., 127; *Fiske v. B. and O. R. R.*, 53 id., 550; *Hamilton v. N. Y. Cent.*, 51 id., 101; *Spooner v. Keiler*, 51 id., 528; Code of Civil Procedure, §§ 190 and 1337; Throop's Code, 568, notes.)

EARL, J. After the verdict in this case, the defendant moved for a new trial upon the minutes of the judge

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before whom the trial was had, and the motion was denied. Judgment was then entered upon the verdict, and the defendant then appealed from the order denying the new trial and from the judgment to the General Term, and there both the order and judgment were affirmed. It then appealed to this court.

There is but one exception in the case, and that is to the exclusion of a question by defendant to one of its witnesses, whether "an average clause in a policy is favorable or unfavorable to an insurance company." I am unable to perceive how the question was material, and I have no doubt it was properly excluded.

But the learned counsel for the defendant claims that there were errors in the charge of the judge; that the verdict was perverse, excessive in amount, and contrary to the law and the evidence; and he contends that these errors can be reviewed here, without any exceptions. For such errors the Supreme Court has ample power to grant new trials, and in the exercise of its discretion, it can grant new trials, although no exceptions were taken upon the trial. But this court can review judgments and grant new trials only for errors of law, and such errors must be pointed out by exceptions taken at the proper time. Such has been the uniform practice of this court, and no decision to the contrary can be found. In *Oldfield v. The N. Y. and H. R. R. Co.* (14 N. Y., 310), where a similar claim was made, COMSTOCK, J., said: "The remaining points of the appellants' counsel, that the damages were excessive, and that the verdict was against evidence and against the law of the case as laid down at the trial, were properly addressed to the Supreme Court, which could reverse the judgment and grant a new trial on those grounds. But this court has no such power. Where a trial and general verdict have been had, we can deal only with questions of law upon exceptions duly taken, and we cannot correct the errors of the jury."

It is claimed, however, that whatever the rule may formerly have been, it has been changed by the New Code, sec-

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tion 999 of which provides that the judge presiding at the trial may entertain a motion upon his minutes to set aside a verdict and grant a new trial upon exceptions, "or because the verdict is for excessive or insufficient damages; or otherwise contrary to the evidence or contrary to the law." The words "contrary to the law" are new. But they confer no new power; the Supreme Court always had that power. It was frequently exercised, and the right to exercise it was never disputed; (*Macy v. Wheeler*, 30 N. Y., 231; *Algeo v. Duncan*, 39 id., 313.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ANNIE T. CURNEN, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

A fact, admitted by a municipal corporation through its officer duly and properly acting within the scope of his authority, is evidence against it; and cannot be withdrawn to the prejudice of one who in reliance upon it has changed his position in respect to the matter affected thereby.

The doctrine of estoppel applies in such case to a corporation as well as to an individual.

An assessment roll is akin to a judgment, and if an assessment is erroneously discharged of record, its lien cannot be restored so as to affect *bona fide* purchasers, or others standing in a similar relation, whose transactions were entered into in ignorance of the error and in reliance upon the truth of the record.

In an action to compel the defendant to discharge a lot in the city of New York belonging to plaintiff from the lien of certain assessments, and to discharge the same of record, it appeared that before plaintiff paid the purchase price for the lot, she ascertained, at the proper office, from the official records, that two assessments, laid in July and August, 1872, upon the lots, were marked upon the record of assessments as "paid by Killian Brothers, * * * March 7, 1873." Plaintiff thereupon, after deducting certain assessments which appeared in the records unpaid, paid the balance of the purchase money and received a deed in November, 1873. These assessments were, in fact, paid at the time stated, by

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Killian Brothers, they supposing the lot was their's, when, in fact, it was not; and the entry was then made by the official having charge of the record. In August, 1876, Killian Brothers commenced an action against defendant to recover back the moneys so paid, alleging they were paid through mistake. Plaintiff was not made a party, and had no notice or knowledge of the action. Defendant served an offer allowing judgment to be entered therein for the amount claimed; judgment was so entered to that effect; and also directing that the entries of payment be cancelled, which was done. *Held*, that plaintiff was entitled to the relief sought; that the fact that the payment was entered as made by Killian Brothers was not sufficient to put plaintiff upon inquiry or charge her with constructive notice of the error; nor was the fact, that in making and receiving the payment the parties acted under a mistake, material so far as plaintiff was concerned.

Also, *held*, that the provision of the act of 1853 in relation to the collection of arrears of taxes, etc., in the city of New York (§ 16, chap. 579, Laws of 1853), providing for the obtaining of receipts or certificates from the clerk of arrears showing payment of assessments, had no application; as it relates only to assessments which have been due twelve months and over, while the assessments in question were paid within nine months after they were due, and while they were still in the collector's office.

It seems, that such receipts or certificates are not the only evidence of the removal of the liens of assessments, even as to those specified.

(Argued December 19, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, affirming a judgment in favor of defendant, entered upon the report of a referee.

This action was brought to compel the defendant to release and discharge a lot owned by plaintiff in the city of New York from the lien of two assessments, imposed for local improvements, and to cancel of record the said assessments.

The facts appear sufficiently in the opinion.

W. H. McDougall, for the appellant. A lien upon lands, created by statute and without the owner's consent, and without any process of law, when once canceled is lost as against a *bona fide* purchaser. (3 N. Y. 547; 2 Duer, 323; *Sharp v. Spier*, 4 Hill, 82.)

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D. J. Dean, for respondent. The assessments have never been actually paid by the plaintiff or her predecessors in title, therefore her claim to have them canceled upon the ground of payment cannot be maintained. (*Mayer v. The Mayor*, 63 N. Y., 455; *Mayor v. Colgate*, 12 N. Y., 140; 43 N. Y. Rep., 452.) The entry of the mistaken payment upon the assessment books does not estop the city from now asserting the actual fact that the assessment is unpaid, and from correcting the entry in conformity to the fact. (*Mayer v. Mayor*, 63 N. Y. R., 458.)

DANFORTH, J. The plaintiff purchased the property in question (known as block No. 101, ward No. 50 a). Before paying the purchase price, or accepting a conveyance, she ascertained at the proper office, and from the official records, that two assessments theretofore, and prior to August 3, 1872, imposed thereon, were marked upon the record of assessment, "paid by Killian Brothers," in the column headed "By whom paid," and "March 7, 1873," in the column headed "When paid." It was conclusively established by the defendant's admissions, and the finding of the referee, that the amount of these assessments was in fact paid at the time stated, and that thereupon the official receiving payment, and who, as such official had charge of the record books, made the entries, "and that such entries were the usual mode in which assessments were marked cancelled in the records." Other assessments for taxes and water rents upon the property, appeared on the same records as unpaid. These were deducted from the purchase price, but the residue was paid by the plaintiff, making no deduction on account of those marked "paid," and she received a deed of the premises in November, 1873. In August, 1876, Killian Brothers commenced an action against this defendant to recover back certain moneys theretofore, as they alleged, paid by them through mistake, upon various assessments, and among others the one above stated. The plaintiff herein was not made a party to that suit, and had no notice or knowledge of

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it. In August, 1876, the defendant answered, setting up that the assessments were valid and subsisting liens upon the lots, and that the collector of assessments had the right to collect and receive them from any person offering to pay the assessments; that they were received by the collector of assessments without mistake, paid by the plaintiffs voluntarily, "and that upon such payments the said collector did cancel said assessments upon said lots, and release said lots from the liens thereof." On the 6th of September, 1876, the defendant served an offer allowing judgment to be entered in that action in favor of Killian Brothers, for the amount claimed, and also that the entries upon the assessment book above referred to, showing the payments upon lot fifty (a), be cancelled, and thereupon judgment was entered to that effect. The referee finds that thereafter, and on the 13th of September, 1876, "the comptroller authorized the collector of assessments, and clerk of arrears, to carry out its provisions for the correction of the errors made by mistake, in receiving the two assessments, by cancelling the entries made upon the assessment books, showing the payments of the two assessments." This was done, and they now stand as apparent liens against the lot purchased by the plaintiff. It appeared also that the collector of assessments had prior to the payment by Killian Brothers, presented them with bills of taxes alleged to be due upon their property, and among other lots mentioned said lot fifty (a), and the same was paid by them, "supposing that said lot fifty (a) was their lot," when in fact it was not.

The learned counsel for the respondent claims nothing from the action or judgment in favor of the Killians, or the proceedings under it, but asserts that the original entry showing payment was erroneous, and that the defendants had an "inherent right to correct it." If the question concerned no one but the defendant, and the person whose duty it was to pay the tax, this might be conceded, but a fact once admitted by a corporation, through its officer, duly and properly acting within the scope of his authority, is evidence

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against it, and cannot be withdrawn to the prejudice of any one, who in reliance upon it, has changed his situation in respect to the matter affected thereby. In such a case the doctrine of estoppel applies to a corporation, as well as to an individual.

The assessments in question were not only liens upon the property described, but charges for which the owner of the property at the time of assessment was personally liable, and whether the corporation sought to enforce them by action, or by a sale of the property, while owned by him, would be immaterial; in neither event could he avail himself of a record which was not in fact true, or the city be precluded from explaining it. (*Mayor, etc. v. Colgate*, 12 N. Y., 140.) It may also be conceded that if the rights of third parties did not intervene, Killian Brothers could have obtained by adverse proceedings, the judgment to which the city consented, or that without judgment the defendant might have paid back the money received by it, and been guilty of no misuse of corporate property. The case of *Mayer v. The Mayor* (63 N. Y., 455), holds this. It stands upon the general rule that money paid under a mistake of fact, may be recovered back, but as is there stated, this rule is "subject to the qualification that the payment cannot be recalled, when the position of the party receiving it has been changed in consequence of the payment, and it would be inequitable to allow a recovery;" and it may well be that if it had there appeared that after the mistaken payment the property assessed had passed into the hands of one buying in good faith, and for value, and that the person assessed had become insolvent since the payment, the defendant would have been permitted to retain the money. The learned judge who delivered the opinion in *Mayer v. The Mayor, etc.* (*supra*), so guards the conclusion reached, that the case is no authority for the defendant here. After stating the general rule he says: "It does not appear that the assessment was in fact cancelled of record, or that the evidence that the lien was discharged, authorized to be given by sec-

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tion 16, chapter 579, of the laws of 1853, was required, or was furnished. If an entry was made of its payment, no reason is shown why, upon discovering the mistake, it might not have been corrected, and the collection enforced against the person liable to pay the assessment, or upon his default, by a sale of the land in respect to which the assessment was made." "It does not appear," he adds "that there has been any change of title, and the rights of subsequent purchasers are not in question."

It is not unreasonable to suppose that if these facts had been shown in the case cited, the result would have been different. They suggest at least countervailing equities, which, as between two innocent parties, would have had force; how much it is needless to inquire now; they appear to some extent in this case, and might have been set up by the defendant against the claim of Killian Brothers. They are now relied upon by the plaintiff, and made the basis of her right of action. She is a purchaser in good faith, and became such in reliance upon the defendant's record. The cases therefore above referred to, and which are cited by the learned counsel for the respondent, lend no support to the judgment which he seeks to uphold. Nor do I perceive any reason why the record showing payment of the assessment does not estop the defendant from asserting the contrary. It became a debt and a lien by virtue of its entry upon the record, and is in no respect like the charge of a merchant upon his books. The record is for the public; with the book no one but its owner has concern, and of itself, it avails nothing; there is, therefore, no analogy in the modes of treatment to which they may be subjected. The assessment-roll is akin to a judgment; both records, and each creating a lien to be enforced by subsequent proceedings, if the debt or duty is not otherwise discharged. (*Mayor, etc., v. Colgate, supra.*) If the latter is erroneously discharged, its lien cannot be restored so as to affect *bona fide* purchasers, or others standing in a similar relation, whose transactions were entered into in ignorance of the

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error, and in reliance upon the truth of the record. (*King v. Harris*, 34 N. Y., 330.) The same rule applies here. There can be no doubt that the plaintiff was led by the entry upon the roll to believe that the assessments had been paid, and if they are enforced now, it will be to her prejudice. It is contended, however, that while the record showed the fact of payment, it also showed that it was made by Killian Brothers, and that the plaintiff was thus put upon inquiry, which if followed up would have disclosed to her that the persons paying were strangers to the property, and the mistake under which the payment had been made. This view could not be taken without carrying the doctrine of constructive notice much farther than it has yet gone. It is resorted to from necessity, and with reluctance, and for the purpose of finding a ground of preference between equities otherwise equal. In the fact stated there is nothing to excite attention, or impair the effect of payment, nor was the plaintiff bound to go beyond it, and ascertain why it was made by Killian Brothers. She was not called upon to suspect that it was not made voluntarily, and with good reason, or that the collector of assessments had received money under circumstances which would permit a repayment. She is chargeable with notice of the whole entry, but not with knowledge of any latent equity in favor of the payor. The important fact was that the assessments were paid, and there was nothing to qualify or affect it. There was no more reason for an inquiry as to why Killian Brothers paid it, than for an inquiry as to whence they obtained the money with which to pay it. The entry suggested no defect in either particular. No laches therefore can be imputed to her, nor has the doctrine of constructive notice any application.

Reliance is also placed by the respondent upon section 16, of chapter 579, Laws of 1853. It is in these words: "The clerk of arrears, upon the requisition of any person, shall furnish a bill of arrears of taxes * * * and of assessments which shall have been due twelve months,

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or over, * * * and upon the payment of the said bill, * * * his receipt thereon (which shall be conclusive evidence of such payment), countersigned by the comptroller, * * * or the *certificate of the clerk of arrears countersigned by the comptroller, that there are no such liens on said lot or lots, shall forever free the said lot or lots, from all liens of * * * all assessments due, thirteen months or over prior to the date of said receipt or certificate, and from all liens in consequence of sales for assessments * * * when the time allowed by law for redemption had not expired at the date or time of said payment or certificate.*"

I am unable to see that it has any application to the case in hand. The first clause relates only to assessments which have been due twelve months or over, and the second to those due thirteen months or over prior to the date of the receipt or certificate. The assessments in question were laid, one in July, and the other in August, 1872. They were actually paid March 7, 1873, less than nine months after they were due, while they were still in the collector's office, and before they came into the "Bureau of Arrears." The clerk of that department had therefore no duty to perform in regard to them. And while the certificate furnishes an easy and convenient method of proving that there was no lien for taxes, assessments, or water rates, of the character therein specified, it is not made by statute the only evidence of that fact, even as to those taxes. Nor can it be supposed that such was the intention of the Legislature, for if so, it would be impossible to establish a clear title to land within the city limits. The assessments are liens, and there can be no period of thirteen or twelve months within which they are not imposed, and by the time the statutory limit for one certificate was reached, another lien would attach: and as neither the receipt nor the certificate would be evidence of payment or extinguishment of any assessment of less than twelve or thirteen months' maturity, there would be no method of assuring a purchaser of city property that its obligations had been discharged. It is not denied that the assessment was

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in fact paid, that it was received by the collector of assessments, that he was the proper officer to collect and receive it, that the entry showing payment was made in an official book kept by him, and in pursuance of his official duty. It was in fact paid and received with the intention of applying it upon the lot in question. Upon this trial these were the material facts. I think the record was the best evidence. But suppose it to have been lost or destroyed, then the receipt given by the collector to the Killian Brothers would have been the next best evidence; but assume also that the receipt was not forthcoming, then like any other matter *in pais*, it could have been proved by witnesses. Nor does the fact that in making and receiving this payment the parties were acting under a mistake concerning the ownership of the lot, make any difference so far as this plaintiff is concerned; she was misled by the defendant's act through its agent; and it is estopped from setting up as against her, that the fact is different from the representation made by the record. This works no injustice. The slightest attention by Killian Brothers at the time of payment to the matter before them, would have prevented the mistake, and a very moderate degree of care on the part of the defendant, when three years afterwards they were called upon to rectify it, would have disclosed such a change of ownership of the lot, as might have justified the city in refusing to comply with the demand. There was then negligence at the outset, laches in discovering or making known the mistake, and an intervening purchaser in good faith, relying upon the record. Whether these facts properly set up would have availed the defendant, it is not now necessary to determine, but they are quite sufficient under the circumstances of this case to sustain the plaintiff's action. A contrary rule would open the door to gross frauds. The money was actually paid, and thereby the lien discharged.

I think that the plaintiff was entitled to the relief demanded, and that the learned referee erred in directing a dismissal of the complaint.

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The judgment of the General Term, and that entered upon the report of the referee should therefore be reversed, and as there is no dispute as to the facts, the plaintiff should have judgment according to the prayer of her complaint, with costs.

All concur.

Judgment accordingly.

BENJAMIN DIETZ, Appellant, v. JOHN T. FARISH,
Respondent.

The parties negotiated for the purchase by defendant, and sale by plaintiff, of certain premises; they agreed upon the price, and a contract was signed in duplicate, to which P. attached his name as a witness. While the papers lay upon the table in the possession of P., defendant inquired as to the papers in respect to the title; plaintiff replied that he had none; defendant then suggested that before proceeding further the matter should be submitted to his counsel for approval, which was assented to by plaintiff. The parties went to the office of that counsel, and he being absent, the papers, with defendant's check for the sum to be paid down, were left with a clerk, with directions to deliver them if the counsel approved; he did not approve, but rejected the title as defective. Before said counsel had given his opinion plaintiff obtained one of the duplicates from the clerk and procured an acknowledgment thereof on the oath of the subscribing witness. In an action for specific performance, *held*, that the facts justified a finding that no contract was concluded; that all the acts of the parties were to be regarded as parts of one transaction, which was never consummated, as there was to be no contract until delivery, and no delivery until approval.

Also, *held*, that plaintiff acquired no advantage by procuring possession of the contract, or the subsequent proof thereof.

Xenos v. Wickham (L. R. [2 H. of L.], 296), distinguished.

(Argued December 19, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Superior Court, of the city of New York, affirming a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term. (Reported below, 12 J. & S., 190.)

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This action was brought to compel a specific performance of an alleged contract.

The facts appear sufficiently in the opinion.

Samuel Hand and *Lewis Sanders*, for appellant. The delivery of the contract deed became immediately binding on the parties, and operates as an estoppel in this action. (*Xenos v. Wickham*, L. R. [2 H. of L.], 296, 299-312, 324; *Mactier v. Frith*, 6 Wend., 112; *S. P. Farmers' Loan and Trust Co. v. Walworth*, 1 N. Y., 445; *Elmore v. Stone*, 1 Taunton, 458; *Adams v. Kers*, 1 Bosqt. & P., 360; *Atlantic Dock Co. v. Leavitt*, 54 N. Y., 35; *Lady Superior v. McNamara*, 3 Barb. Chy., 378; 2 R. S. [B's 6th ed.], § 30, p. 1145; 3 id. [Bank's 6th ed.], p. 671, § 116; 2 id., p. 1145, § 30; 1 id. [Edm. ed.], 148, § 150; *Currie v. Donald*, 2 Wash., 63 [Ct. of App. of Va.]; *Schrugham v. Wood*, 15 Wend., 546; 2 Wharton on Ev., § 930; Bigelow on Estoppel [2d ed.], 241, 283; *Siegfried v. Levan*, 6 Serg. & Rawle, 311; Cruise's Digest, 29, § 59; *Schrader v. Bouker*, 65 Barb., 608; *Frost v. Peacock*, 4 Edw. Chy., 680-696; *Goodrich v. Walker*, 1 Johns. Cas., 253; *Clark v. Rey*, 1 Harris & Johns., 323; *Fisher v. Kean*, 1 Watts, 279; *Garnous v. Knight*, 3 Barn. & Cres., 676, 679, 690; Shep. Touch, 59 [Tit. "Deed"]; *Braman v. Bingham*, 26 N. Y., 491-492; *Cocks v. Barker*, 49 id., 110; Co. Litt., 36 a; 9 id., 137 a; Cruise's Digest, 30, tit. 37, Deed chap. 2, § 58; *Simonston's Estate*, 4 Watts, 181.) The fact found that the suggestion to consult counsel was made after the certification, is conclusive against the defendant. (*Craighead v. Peterson*, 71 N. Y., 279, 286; *Wheaton v. Fay*, 62 id., 283; *Braman v. Bingham*, 26 id., 492.) Payment of the first installment was in performance of the contract. Therefore proceeding to make it was an undeniable affirmation of its operativeness and the prior intent. (*Worrall v. Munn*, 5 N. Y., 244, 245; *Ballard v. Walker*, 3 Johns. Cas., 60.) This contract was valid and irrevocable as soon as signed. (*Worrall v. Munn*, 5 N. Y., 243; *Evans v. Wells*, quoted at

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242; *Bowles v. Woodson*, 6 Gratt.. 78. *Parrill v. McKinley*, 9 id., 1.)

W. W. Macfarland, for respondent. Something more is necessary to the constitution of a contract than the mere signing of the names of the parties to a written or printed formula. The procreating fact is the intention of the parties, the absence of which no form or ceremony can supply. (2 Kent's Com., 477; Addison on Contracts, chap. 26, § 2; Chitty on Contracts, 1, 20; *Mactier v. Frith*, 6 Wend., 103, 112; Pothier on Obl. art. 8, § 1, p. 105; id., § 11, p. 106; 7th ed. [McLaren Book, III], part 1, p. 345; Addison on Contrs., chap. 26, § 2, p. 937; *Pym v. Campbell*, 6 El. & Bl., 370; *Poor v. Petch*, 10 Exch., 613; *Davis v. James*, 17 Com. B., 13, 634.) Parol evidence is admissible to explain and qualify the delivery of a deed or other instrument in writing, even where it has been delivered by the grantor to the grantee. (*Gilbert v. N. Am. Fire Ins. Co.*, 23 Wend., 43; *Cocks v. Barker*, 49 N. Y., 107; *Jackson v. Perkins*, 2 Wend., 308; *Ford v. James*, 2 Abb. Ct. App. R., 159; *Watkins v. Nash*, L. R. [20 Eq. Cas.], 262; *Worral v. Munn*, 5 N. Y., 229.) A specific performance is always discretionary, and is never granted where there is any serious question as to the plaintiff's ability to make a perfect title. (Story's Eq. [Redf. ed.], §§ 740, 742, 758; Fry on Specific Performance, chap. 8; Chitty on Con. [Amer. ed.], 1496, 1497; *Garnet v. Macon et al.*, 2 Brock., 185, 244; *Hendrick v. Gillespie*, 35 Gratt., 193, 194.)

CHURCH, Ch. J. Under the findings of the trial judge, which we think were justified by the evidence, his conclusion that no contract was concluded between the parties, cannot be disturbed. Elaborate opinions were delivered at both the Special and General Terms in which the principles and authorities applicable to the question are fully discussed and cited, and we deem it unnecessary to reiterate them.

The transaction was not an unusual one, and courts should

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construe the acts of the parties according to practical business rules. The parties met to negotiate a sale and purchase of a valuable house and lot, in the city of New York. After some negotiation they agreed upon the price (\$58,000). The plaintiff who was the vendor then produced two blank contracts with a description of the premises filled in, and handed them over to Mr. Pell, who was present as a friend of the defendant, to complete the filling up as to terms, payments, etc. When this was done the parties signed the contract in duplicate, and Mr. Pell attached his name as a witness. While the papers lay upon the table in the possession of Mr. Pell, the defendant inquired of the plaintiff, if he had the papers in respect to the title. The plaintiff said he had no papers, not even his deed, and the defendant then suggested that before proceeding further, the matter should be submitted to his counsel for approval, which was assented to by the plaintiff, and the parties went to the office of the counsel, and finding him absent, left the contracts with a clerk, together with a check for \$2,000 (the amount to be paid down), payable to the counsel's firm, with directions to deliver them, if the counsel approved them. Plaintiff subsequently obtained one of the duplicates from the clerk. Upon the return of the counsel, he not only did not approve the title, but expressly rejected it as defective. It seems to me that the most reasonable construction of this transaction is that all the acts of the parties were done subject to an actual delivery of the contract, and such delivery was intended to depend upon the happening of another event, to wit., the approval of the papers by the defendant's counsel, and that event never happening, no contract was made or intended to be made. The radical error which pervades the elaborate and critical argument of the learned counsel for the plaintiff, is in attempting to separate the formal acts of the parties, and consider them as separate and independent transactions, instead of regarding them all as parts of a single transaction, which was never consummated. He invites us to pause when the plaintiff

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had signed the duplicates and passed them over to the defendant for his signature, and invokes the rule that the statute of frauds is satisfied with a writing signed by the grantor; again when the defendant signed and handed them to Mr. Pell to be witnessed, it is insisted that the contract was mutually assented to and binding, and again when witnessed by Mr. Pell, it is urged that the *locus penitentiae* was gone, and the defendant estopped from denying the contract. These are circumstances tending to prove the *animus contrahendi*, but they are not conclusive, and are subject to explanation, and the explanation is that they were inchoate and subject to an approval by counsel, and an actual delivery. If it had been expressly agreed preliminarily that the papers should be signed and witnessed, but should not be delivered or take effect until the papers were approved, no question could have been raised. The same thing may be inferred from the circumstances. It appears that the parties were comparatively strangers, that the defendant knew nothing of the title, and it would be natural, and according to the dictates of prudence for the defendant before concluding an absolute contract for the purchase of property at so large a price, to make inquiry at least as to the title, and from what took place it is inferable that this was the tacit understanding of the parties. The suggestion to procure the approval of the defendant's counsel, before the contract was consummated, was readily assented to by the plaintiff, from which it is evident that he did not regard it as then consummated, and from which also it may be inferred that the previous formalities were performed with reference to an approval, and to a full consummation by delivery.

The court, in *Kidner v. Keith* (109 E. C. L. R., 34), announced the well established rule. It said: "There is no doubt in point of law that where by express declaration, or from the circumstances, it appears that the delivery of a deed was not intended to be absolute, but that the deed was not to take effect until some contemplated event should

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have happened, the deed is not a complete and perfect deed until that event has happened."

I have examined all the authorities cited, and do not find any that sustain the plaintiff's contention under the circumstances developed in this case. The case of *Xenos v. Wickham* (L. R. [2 H. of L.], 296), relied upon, falls far short of it. A policy of insurance was executed by two directors, and purporting to be signed, sealed, and delivered in the presence of the secretary, made in pursuance of written instructions by plaintiff's broker, but remained in the office to be called for, and it was held to be a valid and binding policy against the company, although not called for. The case was very fully considered, and was decided upon the principle that in such cases the intention of the parties is the controlling test; that the omission to deliver the physical possession of the instrument was not necessarily conclusive that no contract was made, and that whether there was a binding contract, depended upon the intention of the parties. BLACKBURN, J., said: "The mere affixing the seal does not render it a deed, but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed, personally binding on him, it is sufficient;" and this accords with all the authorities. The converse of this is also in general true, that if the circumstances show that there is no intention to make a present binding contract, the formal acts constituting partial or even entire execution, must yield to such intention.

The learned counsel both in their original and supplemental brief put great stress upon the proposition, that a binding contract may be made without a physical delivery of the instrument evidencing the contract. The case just cited is an authority to that effect, and there are others, but this abstract proposition is not decisive of this case. The cases holding this doctrine are exceptional, and require evidence, and very satisfactory evidence that the parties intended that the contract should be binding and operative. The general rule is the other way. In this case the finding and evidence

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are that there was to be no contract until delivery, and that there was to be no delivery until the papers were approved. It is said that the plaintiff supposed that the contract was binding, and that counsel was consulted only as to the payment of \$2,000. If this was so it would not aid the plaintiff; both parties must consent to make a binding contract. Although the parties agreed orally upon the terms of sale and purchase, the defendant certainly never intended to consummate the contract until he was satisfied as to the title; and as the contract never was consummated by delivery, there is no authority for holding him bound against his intention. Could the plaintiff have insisted upon the binding force of the contract at the time the suggestion was made to submit the matter to counsel? I think not; *a fortiori*, not after he expressly consented to such submission. The consent sheds light upon the character of the previous acts, and the understanding of the parties. The plaintiff acquired no advantage by procuring possession of the contract from the clerk, or the subsequent proof by Mr. Pell, although he may have acted in good faith, and no benefit was claimed for these acts on the argument. If any binding contract existed, it was made before the papers were left at the office of the counsel. I do not deem it necessary to review the numerous authorities cited by the respective counsel, nor to pursue the subject further, in view of the elaborate opinions below, with which we concur. There is no claim of any bad faith on the part of the defendant or his counsel, in rejecting the title as defective. A defective title was insisted upon as a defense to this action, and the court below decided that the title was so uncertain as not to be marketable. It seems to have been litigated simply upon the question whether the premises were located wholly within lot 80, of the common lands of the city of New York, as claimed by the plaintiff, or partly in lot 77, as claimed by defendant, without any investigation of the rights of the plaintiff, if the latter fact was true. I infer that the parties assumed in that event that the title was not such as a court

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of equity would compel a party to accept in an action for a specific performance. As to the location, there was a serious conflict of evidence between one set of maps, supported by one surveyor, and another set of maps supported by another surveyor, and an actual survey by the latter. It is unnecessary to pass upon the merits of this question.

The judgment must be affirmed.

All concur.

Judgment affirmed.

WILLIAM D. COLE et al., Appellants, v. WILLIAM S. GOURLAY et al., Respondents.

79	527
167	47
79	527
171	4

Under the provision of the Revised Statutes (1 R. S., 749, § 8), which provides that the title of a *bona fide* purchaser, for a valuable consideration, from the heirs-at-law of a person who died seized of real estate, shall not be defeated or impaired by a devise by such person of the real estate so purchased, unless the will containing the devise shall have been duly proved or recorded within four years after the death of the testator, except, among other things, where it appears that the will has been concealed by the heirs or some one of them, the exception does not apply where the devisees or some one of them have knowledge and possession of the will, and it is taken from such possession clandestinely by an heir and secreted or destroyed; it only applies to a concealment, which leaves the devisees in ignorance of their rights under the will, and deprives them of knowledge of its existence.

Under the provisions of the Revised Statutes, in relation to the sale of the real estate of infants (2 R. S., 194, § 170, *et seq.*), it is not essential that the infant should join in the petition for such sale; it may be made by the next friend or guardian alone.

The rule of the Court of Chancery (rule 158), requiring an infant to join when he is over fourteen years of age, was a mere regulation of practice, which the court had power to waive, and did not affect the jurisdiction or invalidate a sale under the proceedings.

So, also, said court had power to dispense with the provision of said rule, requiring corroborating affidavits; and with that requiring the petition to be by the general guardian of the infant, or to show that he has none.

Where a petition shows that the application was made for and on behalf of the infants, by one entitled to represent them, as provided in said statute, and is in conformity with its requirements, this is sufficient.

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An order of the Court of Chancery in such proceedings adjudged that the special guardian who signed the petition should execute a sufficient conveyance of the interest of the infants; a deed was executed by him in his own name as special guardian; the names of the infants appeared in the deed. *Held*, that the deed was in proper form; that it was not necessary to have it executed in the name of the infants.

In an action of ejectment, plaintiffs claimed under a devise in the will of their father who died in 1836. The devise was to the wife of the testator for life, remainder to plaintiffs. The will after the death of the testator went into the possession of his widow, who was named therein as executrix. In 1841 the will was clandestinely taken by one of the plaintiffs and concealed until 1855, when it was presented for probate. In 1841 proceedings were instituted in the Court of Chancery under the statute to sell the real estate in question, all of the heirs-at-law of the deceased being minors. By virtue of an order in such proceedings the interests of the minors in the premises were sold and conveyed to S. in 1841, who was a purchaser in good faith, for value, without notice of the will. S. and his successors in interest have occupied, claiming title, since that time. Defendant claimed under said deed to S. One of the plaintiffs became of age in 1844, the other in 1847. *Held*, that S. acquired a good title, which was not affected by the devise; that the case was not affected by the exception in said provision of the Revised Statutes, providing, that where the devisee is a minor, the limitation shall not commence to run until one year after he becomes of age, as more than five years had run after plaintiffs became of age, before the will was produced for probate; and that the exception above specified in case of concealment, had no application.

(Submitted December 19, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 9 Hun, 493.)

This was an action of ejectment to recover possession of certain premises situate in the city of Ogdensburgh.

Joseph Cole, father of the plaintiffs, died in 1836, seized of the premises, and leaving a widow and four children, all minors, him surviving. He left a will, by which he devised the same to his wife for life, remainder to plaintiffs; the wife was appointed sole executrix. The court found that in 1841 one of the plaintiffs clandestinely took this will from

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the trunk of his mother, in whose custody it then was, and retained it until April 5, 1855, when he presented it for probate to the surrogate of St. Lawrence county.

In February, 1841, Joseph Arnold, the uncle of the infants, as their next friend, presented a petition on their behalf to the late Court of Chancery, praying for the sale of said infants' real estate, including the premises in question, in which the petitioners stated they had an interest; in which petition the widow joined. Plaintiffs, who were then over fourteen years of age, did not join. No corroborative affidavits accompanied the petition.

On such petition the matter was, by an order of the court, referred to a master, who made his report, upon which an order for the sale of the premises was made, which directed the guardian of the infants to sell and convey. A sale was made at public auction, pursuant to said order, to one Sherman, for \$733.33, he being the highest bidder. Said Arnold having been appointed guardian *ad litem* by the court, and having executed and filed the necessary bonds, executed a deed in June, 1841, to the purchaser on behalf of the infants, in which the widow joined. Arnold executed the deed in his own name as guardian. Sherman, in April, 1846, conveyed said premises to William Kendrick. The defendants entered into possession under Kendrick more than twenty years prior to the commencement of this action, and have continued in possession ever since, claiming adversely to the plaintiffs. Neither Kendrick nor the defendants had any knowledge of this will, nor did Sherman have any knowledge of it until after his purchase. The widow died in 1867. One of the plaintiffs became of age on the 13th day of October, 1844, and the younger became of age on the 26th day of June, 1847.

Further facts appear in the opinion.

Russell & Poste, for appellants. Plaintiffs' title was not divested by the proceedings in chancery. (*Rogers v. Dill*, 6 Hill, 415; *O'Reilly v. King*, 2 Robt., 592; *Forman v.*

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Mursh, 11 N. Y., 551; *Onderdonk v. Mott*, 34 Barb., 110; *Baker v. Lorillard*, 4 N. Y., 266; *Matter of Whitlock*, 32 Barb., 48.) The plaintiffs, pending the life of their mother, were not seized of any real estate, and were not within the provision of the statute; as it requires them to be seized of the land sought to be sold. (*Baker v. Lorillard*, 4 N. Y., 266; *Durando v. Durando*, 23 id., 331, 332; *Green v. Putnam*, 1 Barb., 506; *Dunham v. Osborn*, 1 Paige, 635; *Reynolds v. Reynolds*, 5 id., 161.) The deed was not executed, by or in the name of the plaintiffs, and is the deed of Joseph Arnold, the special guardian, personally. (*Scely v. Hyatt*, 11 N. Y., 55; *Moss v. Livingstone*, 4 id., 208.) Plaintiffs' claim to the lands is not barred by the statute of limitations. (*Jackson v. Selleck*, 8 J. R., 207; *Moore v. Jackson*, 4 Wend., 49; *Jackson v. Schoonmaker*, 4 J. R., 402; *Jackson v. Johnson*, 5 Cow., 95, 104; *Fogal v. Firro*, 10 Bosw., 100-116; *Clark v. Hughes*, 13 Barb., 147-152; *Learned v. Talmage*, 26 id., 454; *Burnham v. Van Zandt*, 7 N. Y. [3 Seld.], 523; *Learned v. Talmadge*; *Burnham v. Van Zandt*, *supra*.)

Geo. Morris, for respondents. The proceedings in chancery were substantially regular, and gave good title to the purchaser. (*O'Reilly v. King*, 28 How. Pr., 409; 2 Robt. Rep., 587; *Matter of Whitlock*, 32 Barb., 48; 19 How., 380; *Matter of Congdon*, 2 Paige, 556; 1 R. S. [m. p.], 730, § 66; *Davison v. De Freest*, 3 Sandf. Chy. R., 464; 2 R. S. 194, § 173; *Howell v. Mills*, 7 Lans., 195, 196; 1 R. S., 723, §§ 7-11; *Brevoort v. Brevoort*, 70 N. Y., 136; 11 Hun, 351; 7 N. Y. Wkly. Dig., 148.) The subsequent discovery and probate of the will, in no way affected the title of the purchaser under the chancery proceedings. (1 R. S., 784, § 3; *Jackson v. Given*, 8 J. R., 140, 141; *Demarest v. Wyncoop*, 3 Johns. Chy. R., 147; *Griffith v. Griffith*, 9 Paige, 317, 318; 1 R. S. [5th ed. m. p.], 737, § 144; *Wood v. Mather*, 38 Barb., 473; 3 Sandf. Chy. R., 456; *Brevoort v. Brevoort*, 70 N. Y., 136; *In re Price*, 67 id., 231.) The plaintiffs' right of action is barred by lapse of time. (Code, § 88, also

§§ 78, 82; 2 R. S., 295, §§ 5, 9, 16; 2 id., 294, § 11; Code of Proc., § 82.)

MILLER, J. The defendants' title is derived by virtue of certain proceedings to sell the real estate of the infant children of Joseph Cole deceased. These proceedings were instituted upon the theory that the deceased died without leaving a last will and testament, and a deed was executed to one Sherman in 1841, who took possession under the same, and occupied until 1846, when he conveyed to William Kendrick, under whom the defendants have occupied the premises, claiming adversely to the plaintiffs for more than twenty years. The plaintiffs claim that the title to the land was not divested by the proceedings and the conveyance in pursuance thereof, for the reason that Joseph Cole died leaving a last will and testament by which he devised the lands in question to his widow for life and to plaintiffs after the death of their mother, and hence the infants were not seized of or entitled to any interest in the land sought to be sold within the provision of 2 Revised Statutes, 194, section 170; and that the sale was made in violation of section 176, 2 Revised Statutes, 195, which declares that no real estate shall be sold etc., "in any manner against the provisions of any last will, or of any conveyance, by which such estate or term was devised to such infant."

If this will was effective at the time of the sale to Sherman, then no title passed, under the proceedings. The proof shows that it was in possession of the widow after the decease of the testator in 1836; that it was taken by the plaintiff, William D. Cole, from his mother's trunk, in the early part of the year 1841, and retained concealed about his person until presented to the surrogate for probate in 1855. The defendants insist that the subsequent production and proof of the will in no way affected the title of the purchaser, under the proceedings for a sale; that they hold under a purchase made in entire good faith and for a valuable consideration, and therefore the will is inoperative; and that they acquired

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a good title, which is fully protected by the statute, which provides that "the title of a purchaser, in good faith and for a valuable consideration, from the heirs-at-law of any person who shall have died seized of real estate, shall not be defeated or impaired by virtue of any devise made by such person of the real estate so purchased, unless the will or codicil containing such devise shall have been duly proved as a will of real estate, and recorded in the office of the surrogate having jurisdiction, or of the register of the Court of Chancery, where the jurisdiction shall belong to that court, within four years after the death of the testator, except: 1. Where the devisee shall have been within the age of twenty-one years, or insane, or imprisoned, or a married woman, or out of the State at the time of the death of such testator, or, 2. Where it shall appear that the will or codicil containing such devise shall have been concealed by the heirs of such testator, or some one of them. In which several cases, the limitation contained in this section shall not commence until after the expiration of one year from the time when such disability shall have been removed, or such will or codicil shall have been delivered to the devisee or his representative, or to the proper surrogate:" (1 R. S., 749, § 3.)

It appears from the finding of the judge upon the trial that neither Sherman nor Kendrick had any knowledge of the will until after the purchase made by them respectively; and the proof shows that such purchases were made for a valuable consideration and in good faith. There is some evidence of the declarations of Sherman, after he had purchased and while he owned the premises, to the effect that he had knowledge of the existence of the will; but this is not material, as it is not proved that he had knowledge or any reason to suppose that there was a will prior to such purchase. If Sherman was a *bona fide* purchaser for a valuable consideration, his title as such inured to the benefit of Kendrick, and he is entitled to protection within the authorities, even if he had notice of the will and did not pay a valuable consideration: (*Wood v. Chapin*, 13 N. Y., 509;

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Webster v. Van Steenberg, 46 Barb., 211.) It is not to be denied, as the evidence stands, that Sherman and Kendrick both purchased without knowledge that the will existed, and the defendants hold possession under Kendrick as tenant.

As the grantees named were *bona fide* purchasers of the heirs for a valuable consideration, and the will was not proved and recorded within four years after the testator's death, they are within the precise terms and limitation of the statute, unless one or more of the exceptions named in the statute applies and prevents its operation. The only exceptions which have any bearing are those which relate, first, to the minority of the devisee at the time of the testator's death; and second, where it appears that the will containing the devise has been concealed by the heirs of the testator, or some one of them. As to the former, the plaintiffs being minors at the time of the testator's death, the limitation named in the statute would only begin to run, as therein provided, one year after the minors respectively arrived at the age of twenty-one years. One of them became of age in 1844, and the other in 1847. If one year be added to the limitation of four years, making five years after the removal of the disability from the youngest one of the plaintiffs, the time would expire in 1852. The will not being proved and recorded until 1855, over five years after the limitation, the title acquired under the proceedings to sell was not affected, and the will was of no force as to the purchaser and those claiming under him, assuming, as we think should be done, and as was manifestly the case, that the purchase was made in good faith and for a valuable consideration. In regard to the second exception, we are of the opinion that it has no application to the facts presented in the case at bar; but it relates to a concealment which leaves the devisees in ignorance of their rights under the will, and deprives them of knowledge of its existence. Certainly the statute cannot relate to a case where the devisees or some of them, have knowledge or possession of the will, and it is taken from the possession of one by another clandestinely

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and secreted for a great length of time, or perhaps destroyed. The will was delivered to the widow, who was executrix and one of the devisees having a life estate, and remained in her possession for a number of years. It is fairly to be inferred that she had knowledge of the character of the instrument, and there can be no question that the son who purloined and concealed it about his person for fifteen years had such knowledge. The case was not one of concealment, within the statute, but of a will which was stolen from the person who was the proper custodian. Under such circumstances, ample relief exists at law against the wrong-doer, and the provision considered has no application: (2 R. S. [Edm. ed.], 69, § 63; *Harris v. Harris*, 26 N. Y., 433; *Schultz v. Schultz*, 35 id., 653.) Even if the statute could be interpreted as covering such a case, William certainly would be concluded by the limitation as a devisee in possession of the will for the period of fifteen years before it was presented for probate and over five years after he became of age. But as to both plaintiffs, under these circumstances the will could not affect the title acquired by a *bona fide* purchaser for value from the heirs of the testator. As we have seen, a case of concealment was not made out, and hence the plaintiffs are not within the exception last considered.

The result must be that the limitation contained in the statute is a defence to the claim of the plaintiffs under the testator's will, and the right of the defendants cannot be affected thereby, provided title was lawfully acquired by Sherman under the proceedings in chancery for the sale of the land. We think that the conveyance to him transferred the interest of the plaintiffs in the premises. It is insisted that the plaintiffs' title was not divested, and several grounds are urged against the validity of the proceedings. So far as the will is concerned, it is already apparent that it cannot affect the rights of the purchaser; and in this respect he must be regarded as having acquired title the same as if the will had no existence.

It is said, however, that the court had no jurisdiction

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either of the person or the subject-matter, as the statute applies only to an infant, and the plaintiffs never did apply, and the application was made by one Joseph Arnold, who applied in his own name, and not in the name of the infant. The petition is by Joseph Arnold, next friend of the infants, and stated that they had an interest in the premises. This sufficiently shows that the application was for and on their behalf, by a party entitled to represent them, and was in conformity with the provisions of the statute. (2 R. S., 194, §§ 170, 175.) It is a sufficient answer to the objection that the proceedings were irregular because the plaintiffs did not join it, that the statute provides that application may be made by the next friend or guardian, and does not require that the infant should unite in the petition with such next friend or guardian. The rule of the court requiring this to be done if the infant is over fourteen years of age, is a mere regulation as to the practice which the court has the power to waive, and does not affect the jurisdiction of the court where there has been a substantial compliance with the law.

It is said there were no corroborating affidavits, as was also required by a rule of the court. This also may be dispensed with by the court itself. No particular form is required, and it is sufficient to confer jurisdiction on the court if the proceedings are in conformity with the general purposes of the statute. A mere departure from a rule of the court does not impair the validity of the proceedings. (*O'Reilly v. King*, 28 How. Pr., 408, 411, 413.)

The last remarks will also apply to the objection that the petition was not by the general guardian, and does not show that he had any. The master's report, as contained in the record, purports to be signed by him, and the deed was not, we think, defective because it was signed by Joseph Arnold. The order of the court adjudged that Joseph Arnold, the special guardian, should execute a sufficient conveyance of the interest of the infants, naming them. It did not require that it should be in their names, although such names appear in the deed and he conveyed as their special

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guardian. The deed was in compliance with the direction of the court and was sufficient. The authorities cited by the appellant are not adverse to this interpretation.

Other points are presented, but the views expressed dispose of the case, and a consideration of them is not required.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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126 330

THE IRVING NATIONAL BANK, Respondent, v. WILLIAM L.
ALLEY et al. Appellants.

Under the provision of the statute (1 R. S., 763, § 5), providing that promissory notes made payable to the order of the maker, or of a fictitious person, if negotiated by him, shall have the same validity, as against him and "all persons having knowledge of the facts, as if payable to bearer," the facts of which a person must have knowledge in order to give the note efficacy as against him, as if payable to bearer, are simply that the note is payable to the order of the maker or of a fictitious person.

A note payable to the order of the maker, therefore, as against an accommodation indorser having knowledge of this fact, is to be considered as if payable to bearer; and is valid, although negotiated without the indorsement of the payee.

It seems, that such an indorser, as against a *bona fide* holder, would be estopped from denying knowledge for the purpose of defeating the note; as the fact appears in the note, and he will not be permitted to say that he did not read or know the contents of the instrument signed by him.

(Submitted December 19, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was upon a promissory note made by defendants.

The facts appear sufficiently in the opinion.

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Sidney S. Harris, for appellants. Before the statute respecting notes, made payable to the order of the maker, such a note as that in suit could not be negotiated so as to make the second indorser liable without indorsement by the payee, and his assuming the responsibility of first indorser. (*Raynor v. Hoagland*, 39 Superior Ct., 11; *Stoddard v. Peniman*, 108 Mass., 366; *Lancaster National Bank v. Taylor*, 100 id., 108; *Hedges v. Seely*, 9 Barb., 214; *Harcop v. Fisher*, 10 C. B. [N. S.], 196; *Smith v. Lusher*, 5 Cow., 688; *Titcomb v. Thomas*, 5 Greenl., 282; *McPherson v. Thoyter*, Peake's N. P. C., 24; *Bousanquet v. Anderson*, 6 Esp., 43.) In such case the transferee, without indorsement, obtains a mere equitable title, i. e., the title of the payee. (*Hedges v. Seely*, 9 Barb., 214; *Daniel Neg. Ins.*, 553, 554; *Bacon v. Burnham*, 37 N. Y., 614; *Central Park v. Hammett*, 59 id., 158; *Whistler v. Foster*, 14 C. B. [N. S.], 248; *Gibson v. Miller*, 25 Mich., 355; *Lancaster Bank v. Taylor*, 100 Mass., 18.) Assuming that the note in suit is not to be treated as payable to bearer, this action cannot be maintained on the ground that the note was made without restriction. (*Hall v. Newcomb*, 7 Ill., 416; *Bacon v. Burnham*, 37 N. Y., 618.) Defendants as second indorsers occupy the position of sureties for Combes, as first indorser. (*Bacon v. Burnham*, GROVER, J., 619, *supra*.) The payee of a note indorsed by a third person cannot recover against such indorser, and a party having no right upon a note himself can transfer none to another knowing all the facts. (*Herrick v. Carman*, 12 J. R., 159; S. C., 10 id., 224; *Tilman v. Wheeler*, 17 id., 328; *Moore v. Cross*, 19 N. Y., 227; *Bacon v. Burnham*, 37 id., 614.) Combes' right to use the note was coupled with the restriction that the note be indorsed by him so that defendants might, at maturity, take up the note and recover against Combes. (*Losee v. Bissell*, 78 Pa. St., 459; *Gilbert v. Finckbirner*, 68 id., 213; *Fegenbust v. Lang*, 28 id., 193.) The facts do not bring this case within the statute. (1 R. S., 768 [m. p.], § 5; 3 id. [5th ed.], 68, § 5). It was error to find that defendants are liable on the note without the indorse-

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ment of Combes. (*Maniort v. Roberts*, 4 E. D. Smith, 83; 3 Kent, 78 [m. p.]; *Collis v. Emmett*, 1 H. Black, 313; *Bennett v. Farrell*, 1 Camp., 130-180; *Maniort v. Roberts*, *supra*; Peake's Add. Cases, 146; 1 Parsons on Bills, 32, 33, note; *Minet v. Gibson*, 3 T. R., 481; S. C., 1 H. Black., 569; *Collis v. Emmett*, 12 id., 312; *Tuft's Case*, Leach Cro. Law, 206; *Hunter v. Blodgett*, 2 Yeates, 480; *Foster v. Shattuck*, 2 N. H., 446; *Plets v. Johnson*, 3 Hill, 112; *Farnsworth v. Drake*, Ind., 101; Reviser's Notes to 1 R. S., 768, § 5; *Smith v. Lusher*, 5 Cow., 688; *Hooper v. Williams*, 2 Exch., 13; *Brown v. De Winter*, 17 L. J. Chy., 270; S. C., 60 E. C. L. R.; *Gay v. Sander*, 6 C. B., 336; 2 Daniel's Neg. Instruments, § 130, note; Story on Promissory Notes, § 16; *Maniort v. Roberts*, 4 E. D. Smith, 83; 2 Kent, 78 [m. p.]; *Hunter v. Jeffrey*, Peake's Add. Cases, 146; *Collis v. Emmett*, 1 Black., 313; *Minet v. Gibson*, 3 T. R., 481; *Tallock v. Harris*, 3 id., 174; *Hunter v. Blodgett*, 2 Yeates, 480; *Foster v. Shattuck*, 2 N. H., 446; *Bennett v. Farrell*, 1 Camp., 130, 180; 1 Parsons on Bills, p. 32, and note.)

John L. Lindsay, for respondent. Notes made payable to the order of the maker, or to the order of a fictitious person, if negotiated by the maker, have the same effect, and are of the same validity as against the maker and all persons having knowledge of the facts, as if payable to bearer. (2 R. S. [6th ed.], 1160.) Under this act the holder is entitled to recover, notwithstanding he received the note with knowledge of the circumstances. (Edwards on Bills and Prom. Notes [2d ed., m. p.], 130; *Cent. Bank of Brooklyn v. Lang*, 1 Bosw., 205; *Stevens v. Strong*, 2 Sand. R., 138; *Plets v. Johnson*, 3 Hill, 112; see, also, *Willets v. Phoenix Bank*, 2 Duer R., 130; Story on Bills, § 56, and cases cited; *Vin v. Lewis*, 3 Term R., 183; Chitty on Bills, 158, and note; *Minet v. Gibson*, 1 H. Black, 569; affirmed in the House of Lords; *Bigelow v. Cotton*, 13 Gray, 309.) Assuming that the note in suit was not negotiable without the indorsement of Combes, the appellants may be

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held liable as makers or guarantors. (*Griswold v. Slocum*, 10 Barb., 402; *Richards v. Warring*, 39 Barb., 42; 1 Keyes, 576; *Cromwell v. Hewitt*, 40 N. Y., 491; Edwards on Bills and Prom. Notes [2d ed.], 239, 290; *Erwin v. Smith*, 7 Pick. R., 291; *Aymar v. Sheldon*, 12 Wend., 443, and C. C.; *Matthews v. Bloome*, 33 L. J. [Q. B.], 213; *Penny v. Innis*, 1 Cr. M. and R., 439; and see *Ashpitel v. Bryon*, 5 B. and S., 723; 32 L. J. [Q. B.], 91; 33 id., 328; *Dean v. Hall*, 17 Wend., 214; *Moore v. Cross*, 19 N. Y., 223.)

EARL, J. On the 24th day of April, 1876, John Combes made a note, of which the following is a copy :

“Ninety days after date. I promise to pay to the order of myself seven thousand dollars, at Irving National Bank, value received.
JOHN COMBES.”

The note was indorsed by the defendants for the accommodation of Combs, and was discounted for him by the plaintiff without his indorsement. He became insolvent before the note fell due, and the defendants applied to the plaintiff for the renewal of the note, upon payment by them of \$1,000 thereon. Thereupon they paid the plaintiff one thousand dollars and gave the note in suit for the balance. They now claim, in defense of this action, that at the time they gave this note, they did not know that Combes had not indorsed the prior note, and that they were not, therefore, liable thereon, and that they gave this note under mistake in that respect.

It might be sufficient to say here that there is no finding by the referee, nor request to find that the defendants did not know that Combes had not indorsed the prior note, or that they were under any mistake of fact when they gave this note ; and that there is no allegation in the answer that the defendants did not know, when they indorsed the prior note, that it was payable to the order of the maker.

But the plaintiff obtained a perfect title to the prior note, without the indorsement of Combes. It is provided in the Revised Statutes (1 R. S., 768) that “notes made payable

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to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer."

It is admitted by defendant's counsel that the prior note must be treated as a note payable to bearer, if they had "knowledge of the facts" within the meaning of the statute; and to that effect are the decisions: (*Plets v. Johnson*, 3 Hill, 112; *Gen. Bank of Brooklyn v. Lang*, 1 Bosw., 205.) Under this statute, of what facts must a party have knowledge, to make him liable as upon a note payable to bearer, after the note has been negotiated? Simply that the note is payable to the order of the maker or of a fictitious person. If so payable, the name of the payee need not be indorsed thereon before negotiation. It must then be treated, without such indorsement, as a note payable to bearer. In this case, as before stated, there is no allegation in the answer that the defendants did not know, when they indorsed that note, that it was payable to the order of the maker; and notwithstanding the imperfect denial of the defendant, Alley, as a witness, the referee might well have found that he did have such knowledge, and we may, therefore, assume that he did so find.

But, under the circumstances of this case, the defendants would not be permitted to deny such knowledge for the purpose of defeating the note. That it was payable to the order of the maker, was plainly written, and there could be no mistake about it. Any person reading it would see that it was so written. There was no fraud or deception practiced upon the defendants. Under such circumstances they can not be permitted to say, against a *bona fide* holder of the note, that they did not read or know the contents of the instrument signed by them.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Respondent, v. CAMILLA HUNT, a lunatic, et al., Appel-
lants.

79	541
128	391

It seems, that an obligation entered into by an insane person to repay money loaned, of which he had the benefit, is valid where the lender acted in good faith, without fraud or unfairness, and without knowledge of the insanity or notice or information calling for inquiry; and an action is maintainable thereon.

The fact that the borrower was subsequently, upon inquisition taken, declared to be insane, does not affect the right to recover.

(Submitted December 12, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 14 Hun, 169.)

The nature of the action and the facts are set forth sufficiently in the opinion.

Robert P. Harlow, for appellants. The inquisition is *prima facie* proof of insanity during the period of time covered by it, and during every part of such period. (Greenleaf on Ev., vol. 1, § 556 [Redfield's 12th ed.]; *Van Dusen v. Sweet*, 51 N. Y., 381; *Hart v. Deamer*, 6 Wend., 497; *Hicks v. Marshall*, 8 Hun, 327.) It is presumptive proof against all persons, including those not parties or privies thereto. (*Wadsworth v. Sharpstein*, 8 N. Y., 392; *Goodell v. Harrington*, 3 T. & C., 345.) It threw the burden on the plaintiff to prove the sanity of the mortgagor. (*Goodell v. Harrington*, 3 T. & C., 345.) The plaintiff is bound to prove that the mortgagor was sane at the very time the mortgage was given. (*Jackson v. Van Dusen*, 5 J. R., 159; *Attorney-General v. Parnther*, 3 Bro. Ch. R. [Am. ed., 1844], 441, 443, 445; *White v. Wilson*, 13 Ves., 88; *Waring v. Waring*,

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6 Moore [Privy Council], 341; S. C., 12 Jurist, 947; *Hall v. Warren*, 9 Ves. Jr., 611; 1 Story's Eq. Jurisp. [12th ed.], 219, § 222; *Haviland v. Hayes*, 37 N. Y., 33; *Sheldon v. Hudson R. R. Co.*, 29 Barb., 226.) The burden is on the plaintiff to show that the corpus of the lunatic's estate was swelled by the loan. (*Lincoln v. Buckmaster*, 32 Vt., 652.) In dealing with any person it is the duty of both contracting parties to use care. They deal at their peril. (*Wadsworth v. Sharpstein*, 8 N. Y., 393; *Seaver v. Phelps*, 11 Pick., 304.) The plaintiff could not, by paying a judgment against Miss Hunt, or by paying taxes on her property, without her request or a subsequent promise to repay, constitute themselves in any sense her creditors. (*Beach v. Vandenburg*, 10 J. R., 361; *Wallkill v. Overseers of Mamekating*, 14 id., 87; 2 R. S. [Banks' 6th ed.], 1094, § 17.) The mortgage was wholly void under the Revised Statutes. (2 R. S. [Bank's 6th ed.], 1094, § 17; *Ingraham v. Baldwin*, 9 N. Y., 45; *Van Dusen v. Sweet*, 51 id., 381; *Dexter v. Hall*, 15 Wall., 9.) Even if the mortgage is only voidable, no action is necessary to avoid it. (Story's Eq. Jur., vol. 1, p. 224, § 329, and citing *Jacobs v. Richards*, 5 De G. M. & G., 55.) Even if an action is brought, it is not necessary, in order to maintain it, to tender, or pay back, the consideration. (*Gibson v. Loper*, 6 Gray, 279.)

Winchester Britton, for respondent. The finding of the justice at Special Term, that the lunatic was of sound mind when the loan was made, has abundant evidence to support it, and is conclusive on this appeal. (*Verplanck, Rec'r v. Member N. Y. Ct. of Appeals*, 7 N. Y. Weekly Digest, 397; *Paine, Rec'r v. Jones*, N. Y. Court of Appeals, 8 N. Y. Weekly Digest, 14.) An executed contract made with a lunatic, in good faith, for a full consideration, without advantage taken of the lunatic, without knowledge of the insanity, and without such information as would lead a prudent person to a belief of the incapacity, and when

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there had been no finding of insanity by a commission *de lunatico inquirendo*, will be enforced as against the lunatic. (*Lincoln v. Buckmaster*, 32 Vermont, 52; *In the Matter of Beckwith*, 3 Hun, 443; 2 Kent's Commentaries, 51, note; *Matthiesson v. McMahon*, 38 N. J. L., 536; *Beaven v. McDonald*, 9 Exch., 309; 23 L. J. Exch., 94; 2 C. L. R., 474; *Sims v. McLure*, 8 Richardson Eq., 286; *Dane v. Kirkwell*, 8 Car. & Payne, 679; *Lancaster Co. Bank v. Moore*, 78 Penn. [5 St.], 407; 21 Am. R., 24; *Beals v. See*, 10 Barr., 56; Addison on Contracts [6th ed.], 1033-4; Ordonaux on Insanity, pp. 300, 301, 303 and 304; *Canfield v. Fairbanks*, 63 Barb., 461; *Brown v. Joddrell*, 3 Car. & Payne, 30; *Bagster v. Portsmouth*, 5 B. & C., 170; *Elliott v. Ince*, 7 De G. M. and G., 475; *Alcock v. Alcock*, 3 M. & G., 268; *Tarbuck v. Bispham*, 2 Mees & W., 2; *Frost v. Bevan*, 22 L. J. Ch., 638; *Young v. Stevens*, 48 N. H., 133; *Molton v. Camroux*, 2 Exch., 501; *In re Beals*, 10 Barb., 56; *Lincoln v. Buckmaster*, 33 Vt. R., 652; *Molton v. Camroux*, 2 Exch., 501; *Wilder v. Weakley*, 34 Ind., 181; *Brown v. Joddrell*, 3 C. & P., 30; *Neill v. Morley*, 9 Vesey, 478; *Younger v. Skinner*, 1 McCarter, 389; *Menkins v. Lightner*, 18 Ill., 282; *Elliott v. Ince*, 7 De G. M. & G., 475; *Molton v. Camroux*, 2 Exch., 501; *Wilder v. Weakley*, 34 Ind., 181; *Voorhees v. Spencer*, 2 Paige Ch., 153.) When the contract is void because of insanity, it is only when one has wholly lost his understanding—is absolutely *non compos mentis*. (*Osterhout v. Shoemaker*, 3 Denio, 37, note; 14 Barb., 494; Willard's Eq. Juris., 675; *Blanchard v. Nestle*, 3 Denio, 37; *Neill v. Morley*, 9 Vesey, 478; *Lancaster Co. Bk. v. Moore*, 78 Pa. St., 40; 21 Am. R., 24; *Odell v. Buck*, 21 Wend., 142; *Van Deusen v. Sweet*, 57 N. Y. R., 379; *Sozeau v. Shields*, 23 N. J. Eq., 509; *Hovey v. Hobson*, 53 Me., 256; *Miller v. Craig*, 36 Ill., 109; *Speers v. Sewell*, 4 Bush., 239; *Dennet v. Dennet*, 44 N. H., 531; *Rippy v. Gaunt*, 4 Fred., 443.) As to an obligation before inquest found, though the lunatic be found thereby to have been insane without lucid intervals, from

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a period anterior to the obligation, the finding is presumptive evidence of insanity only, and that it is evidence at all is an exception to the rule, that persons not parties to the proceedings are not affected thereby, being *res inter alios acta*, the reason of the exception being the supposed publicity of the proceedings. (*Jackson v. King*, 4 Cow., 217; *Hart v. Deamer*, 6 Wend., 497; *Griswold v. Miller*, 15 Barb., 520; *Willard's Eq. Juris.*, 199; *Hoyt v. Ade*, 3 Lansing, 173; *Faulder v. Silk*, 3 Camp., 126; *Banker v. Banker*, 63 N. Y. R., 409; *Goodell v. Harrington*, 3 N. Y. Supr. Ct. R., 345; *Neill v. Morley*, 9 Vesey, 478; *In re Palmer*, 4 How. Pr., 34; *Hutchinson v. Zandt*, 4 Rawle, 234; 2 Kent's Com., 450; *Dane v. Kirkwell*, 8 Car. & Payne, 679; *Pearl v. McDowall*, 3 J. J. Marsh, 658; *Jackson v. Gumaer*, 2 Cow., 552; *Dexter v. Hall*, 15 Wallace, 9; *Waite v. Maxwell*, 5 Pick., 217; *Rusk v. Tenton*, Kentucky Ct. of Appeals [Alb. Law J.], 340; *Banker v. Banker*, 63 N. Y., 413; *Van Deusen v. Sweet*, 51 N. Y. R., 378.

DANFORTH, J. The action is for the foreclosure of a bond and mortgage, dated April 23, 1870, and then executed by the defendant Hunt for the purpose of securing to the plaintiff the payment of \$4,000, on the 1st of September, 1871. The complaint shows that interest was paid on the 1st of March, 1871, but default made in September following; that in December, 1871, the defendant Hunt was adjudged a lunatic, and Arnold H. Wagner appointed committee of her person and estate. He was made co-defendant with her; and in her behalf, and by way of defense alleges "that at the time of the execution of the bond and mortgage she was a lunatic, and incapable of making or executing them." The issue thus presented was tried before a careful and experienced judge at Special Term and he found as a fact: "That at the time of the execution and delivery of the bond and mortgage, the said Camilla Hunt was of sound mind, and was capable of making and executing said

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bond and mortgage," and ordered judgment in accordance with the prayer of the complaint. The finding is well warranted by the evidence, and upon this ground alone, we should be required to affirm the judgment.

But the learned court at General Term went beyond it, and for the purposes of the appeal assumed, without deciding, the contrary of the finding to be the truth, yet held, that as the case presented a contract executed upon a valuable consideration, of which the lunatic had the benefit, made by the plaintiff "in good faith, without fraud or unfairness, without knowledge of the insanity, and without notice or information calling for enquiry," that the plaintiff was entitled to recover. The correctness of this conclusion is strenuously assailed by the learned counsel for the appellant, but both upon principle and authority we think it must be sustained. Upon principle because the plaintiff's money was had by the defendant, appropriated to her use, and thus tended to increase the body of her estate, and although in some cases a man may now, notwithstanding the old common law maxim to the contrary (*Beverly's Case*, 2 Coke's R., 568, pt. 4, 123, b), "be admitted to stultify himself," yet he cannot do so to the prejudice of others, for he would thus make his own misfortune an excuse for fraud, and against that the doctrine of the maxim stands unaffected by any exception. (1 Story's Eq. Jurs., § 226.) In this case the loan was made in the ordinary course of business; it was a fair and reasonable transaction; the defendant acted for herself, but with the aid of an attorney; if mental unsoundness existed, it was not known to the plaintiff, and the parties cannot now be put *in statu quo*. The defendant was therefore properly held liable.

Very much in point, and upon circumstances similar to those above stated, was *Molton v. Camroux* (2 Exch. [Welsby, H. & G.], 487), affirmed in error, 4 id., 17. Concerning it, the chancellor in *Elliott v. Ince* (7 DeG., M. & G. [56 Eng. Chy.], 487), says: "The principle of that case was very sound, viz.: that an executed contract, when par-

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ties have been dealing fairly, and in ignorance of the lunacy, shall not afterwards be set aside; that was a decision of necessity, and a contrary doctrine would render all ordinary dealings between man and man unsafe." And so it has been held, and like contracts enforced upon the same principle, in repeated instances, in the courts of this and other States. (*Loomis v. Spencer*, 2 Paige, 153; *In the Matter of Beckwith*, 3 Hun, 443; *Canfield v. Fairbanks*, 63 Barb. 461; *Lancaster County Bank v. Moore*, 78 Penn. St., 407; *Wilder v. Weakley*, 34 Ind., 181; *Matthiessen & Co. v. McMahon*, 38 N. J. Law, 536; *Behrens v. McKenzie*, 23 Iowa, 333.) These cases stand on the maxim "that he who seeks equity, must do equity," and it is applicable to the case in hand; for the defendant seeks to deprive the plaintiff of its remedies to enforce the security while she retains the benefit of the contract. This is so plainly inequitable and unjust as to render a further discussion unnecessary. Nor does the fact that the borrower was subsequently upon inquisition taken, declared to be insane, alter the result. Such proceeding has no effect upon a contract made without notice, and on the faith of the presumption that the person contracted with was of competent understanding.

The judgment should be affirmed.

All concur.

Judgment affirmed.

79	546
163	121
79	546
167	172

JOHN W. EIGHMY, Plaintiff in Error, v. THE PEOPLE OF
THE STATE OF NEW YORK, Defendant in Error.

A writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken upon trial.

No exception lies to a refusal to postpone a criminal trial by reason of the absence of witnesses.

An indictment charged perjury in testimony given by the accused before a referee, in a case where a reference was ordered on default, a decision had, and judgment rendered. The testimony was in reference to the loss of a will; there was no question as to its execution. The accused

79	546
172	248
172	243

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moved to postpone, upon affidavit, that two material witnesses were absent; one of whom was a subscribing witness to the will; the other, it was alleged, was acquainted with a witness for the people. It was not alleged that a subpoena had been taken out, or any effort made to secure their attendance. The motion was denied. *Held*, that if the question as to the refusal to postpone was reviewable here, there was no error.

Also, *held*, that the accused was not entitled to a postponement on the ground that a civil action was pending, involving the facts in reference to which the alleged perjury was committed.

The indictment did not allege, in terms, the commencement and pendency of the civil action; it charged that a referee was duly appointed in an action then pending in the Supreme Court of this State, naming the parties. *Held*, that this was a sufficient averment to show that the court had jurisdiction of the parties.

The indictment charged that the referee was "duly and legally appointed in the action" by a justice of said court, "by an order duly made * * * in said action at the chambers of said justice;" also that the referee was "duly authorized and qualified to perform the duties of that office." It was objected that the indictment was defective, as it did not state that the order of reference was made by the court, but set up an *ex parte* chamber order. *Held*, untenable; that it was to be presumed the justice acted in accordance with law, and as he had a right to hold Special Term at his chambers, and as the appointment was alleged to have been lawfully made, the legitimate inference was that the order was made at Special Term.

It is not necessary, in an indictment charging perjury committed before a court of general jurisdiction, to set out all the facts showing jurisdiction; an averment that the court had sufficient and competent authority to administer the oath will suffice.

Geston v. People (4 Lans., 487), distinguished.

Also, *held*, that proof of the entry of the order of reference was not required, the granting of the order gave the referee jurisdiction.

Bonner v. McPhail (31 Barb., 107), distinguished.

The testimony of the prisoner, which was alleged to be false, was to the effect that one A. had told him that he had taken charge of all of the papers of the testator after his decease, and in moving them lost the will; that he had requested A. to make an affidavit of such fact, which he did. The prosecution was allowed to prove, under objection and exception, that the testator in his life-time burned a paper resembling the will, he declaring at the time that it was his will, and stating its provisions and his reason for destroying it. *Held*, no error; that the declarations were competent, as part of the *res gestæ*.

But, *held*, that evidence of declarations of the deceased, made after the alleged destruction of the will, were incompetent.

Also, *held*, that it was competent for the prosecution to show that when A. signed the affidavit, sworn to by him, he was imposed upon by the prisoner, he substituting it for another A. had heard read, which did not contain the clause in question.

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Also, *held*, that the judgment-roll in the civil action was competent evidence.

Also, *held*, that a refusal of the court to compel the district-attorney to furnish to the prisoner's counsel all the evidence before the grand jury was not error ; that it was a matter within the discretion of the court.

(Argued December 4, 1879 ; decided January 13, 1880.)

ERROR to the General Term of the Supreme Court, in the third judicial department, affirming a judgment of the Court of Sessions, in and for the county of Saratoga, entered upon a verdict convicting the plaintiff in error of the crime of perjury.

The indictment charged : " That heretofore, to-wit., on the first day of May, in the year of our Lord one thousand eight hundred and seventy-eight, at the town of Milton, in the county of Saratoga and State of New York, before James W. Verbeck, Esq., then and there being a referee duly and legally appointed in an action commenced and then pending in the Supreme Court of the State of New York, in which one John W. Eighmy was plaintiff, and Albert Eighmy and Alfred Eighmy, Jr., were defendants, by Hon. J. S. LANDON, one of the justices of said court in and for the State of New York aforesaid, by an order duly made on the twenty-sixth day of April, in the year of our Lord one thousand eight hundred and seventy-eight, in said action, at the chambers of Hon. J. S. LANDON aforesaid, at the city of Schenectady, in the State aforesaid, in and by which said order the said James W. Verbeck was appointed as a referee to take proof of all the material facts alleged in the complaint in said action and make a report of the same to the said Supreme Court thereon, and being then and there duly authorized and qualified to execute the duties of the office of said referee, and being then and there duly sworn, * * * the matters referred to in and by said order then and there came on to be heard."

The indictment also charged in substance that upon taking said proof before said referee said John Eighmy was sworn in due form of law, by and before said referee. as a witness ;

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that it was a material question, in taking the proofs, as to whether Alfred Eighmy, the father of said John W. Eighmy, duly made, published and declared his last will and testament in the words and figures as set forth in said complaint, and whether such will was in existence at the time of the death of said Alfred Eighmy; that said John W. Eighmy, as such witness, for the purpose of obtaining a judgment in said action establishing such will, did willfully and corruptly testify that he was in the year 1876 requested by said Alfred Eighmy to make a copy of a will made by him February 9, 1876, a copy of which was set out in said complaint; that said Alfred Eighmy, Jr., told him in February, 1878, that he had taken charge of all of the private papers of the said Alfred Eighmy, and in moving them had lost some of them, and among them the said will; that he requested the said Alfred Eighmy, Jr., to make affidavit to that fact, to be used in establishing such will as a lost will, whereas, in truth, the said John W. Eighmy was not so requested to make a copy of such will, and was not so informed by Alfred Eighmy, Jr., nor was the latter requested to make such an affidavit; and whereas said will was not in fact lost, but was revoked and destroyed by the said testator in his life-time.

When the case was moved for trial, the prisoner's counsel, before a jury was empaneled, moved the court to order the district attorney to disclose what evidence was produced before the grand jury, and whether any other evidence was produced, save such as had been furnished the prisoner, and to furnish said counsel with such further proofs and evidence, if any, with a view of moving to quash the indictment, on the ground that there was not sufficient evidence before the grand jury to justify it. The motion was denied.

The prisoner's counsel then moved for the postponement of the trial upon the ground that a civil action was pending involving the question to be tried under the indictment, in which case the prisoner was a necessary and material witness, and also on the ground of the absence of two material

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witnesses. The affidavit on which the motion was founded alleged the pendency of the civil action in which the testimony was given, charged to be false; also, that two witnesses named were necessary and material. One of them, it was alleged, was a subscribing witness to the will; the other was acquainted with one of the witnesses for the prosecution. The affidavits did not state that any efforts had been made to procure the attendance of these witnesses. The motion was denied.

After the opening of the case to the jury on the part of the prosecution, the prisoner's counsel asked the court to direct an acquittal, on the ground that the indictment did not allege the commencement and pendency of any action in the Supreme Court, or the nature of the action, so that it could appear why or how the evidence given by the prisoner was material; that the referee did not appear to have been appointed by the court, but by an *ex parte* chamber order. The motion was denied, and said counsel duly excepted.

The judgment-roll in the civil action was offered in evidence. This was objected to. Objection overruled.

The further facts appear sufficiently in the opinion.

F. Fish, for plaintiff in error. For the purpose of a conviction for perjury, the controverted oath of the prisoner must be met by one credible witness, who is free from prejudice or partiality; and his testimony must be corroborated by tangible facts and circumstances substantially equivalent to an additional witness. (*Woodbeck v. Keller*, 6 Cow., 118.) A refusal to postpone the trial of an indictment, when good cause is shown, will be received as matter of law by this court. (*People v. Vermilyea*, 7 Cow., 383; *Ogden v. Payne*, 5 id., 15; *Hooker v. Rogers*, 6 id., 577; *Onderdonk v. Paultett*, 3 Hill, 323; 3 Howard, 49; 3 Wharton [7th ed.], §§ 3036, 3037.) An indictment for perjury ought not to be prosecuted during the pendency of a civil action, in which the alleged false oath was taken, and involving the truth or falsity of the oath. (2 Wharton [7th ed.], § 2280; Whar-

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ton Amer. Cr. Law [6th ed.], vol. 3, § 2280; Peep on Crimes [6th Amer. ed.], 654, § 3188; Rus. on Cr. [6th Amer. ed.], 654, § 3188; *People v. Dickinson*, 5 P. J., 164.) It should appear on the face of an indictment for perjury that the alleged false testimony was material to the determination of the question upon which it was given. (*Geston v. The People*, 4 Lans., 487.) An oath or affirmation, upon which perjury is assigned, must be taken before a competent jurisdiction, and must be so declared in the indictment. (*R. v. Aglett*, 1 Term. Rep., 69; *Bonner v. McPhail*, 31 Barb., 107; *State v. Plummer*, 50 Maine, 217; *State v. Marshall*, 47 Mo., 378; *People v. Marcellus*, 32 Ill., 499.) The referee in the case, in which the prisoner was sworn, could only be lawfully appointed by the court. (Code, §§ 1013, 1014, 1015.) The order of reference must be made by the court and actually entered before the referee has jurisdiction to administer an oath. (*Bonner v. McPhail*, 31 Barb., 107.) At the time the prisoner was sworn before the referee no order of reference had been entered, and the motion in arrest should have prevailed. (31 Barb., 107; *Hunt v. Wallace*, 6 Ch. Rep., 371; *People v. Cook*, 2 Roohn, 12; 2 Storhil Cr. Ev., 622; Roscoe Cr. Ev. 809, 810, 814.) A motion in arrest, for error appearing on the face of the record, may be reviewed on writ of error. (*People v. Allen*, 43 N. Y., 28; 2 Burrow's R., 1127.) A motion to quash will prevail when it appears that the evidence given before the grand jury is inadequate to support it. (*People v. Pesturblatt*, 1 Abb. Pr. R., 268.)

Nathaniel C. Moak, for defendant in error. A writ of error only brings up the record and proceedings upon the trial, and not what occurred before or after the trial. (*People v. Casey*, 72 N. Y., 393, 396, 397; *Hunt v. People*, 8 N. Y. Weekly Dig., 431; 19 Alb. L. Jour., 95, Court Appeals; *People v. Thompson*, 41 N. Y., 145; *Gaffney v. People*, 50 id., 416, 425, 426; *Donahoe v. People*, 56 id., 208, 211; *Willis v. People*, 32 id., 720-723; 2 R. S., 741, § 20; 2

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Edm. St., 766; *People v. McCann*, 6 Park., 290; 2 R. S., 736, § 21; 2 Edm. St., 760; *Gaffney v. People*, 50 N. Y., 416, 425, 426.) The question as to whether the trial court properly exercised its discretion in granting or refusing a continuance cannot be reviewed on writ of error. (*Com. v. Donovan*, 99 Mass., 425, 426; *Com. v. Drake*, 124 id., 24.) No harm was done to plaintiff in error on account of the absence of the witness Livermore. (*People v. Gonzales*, 35 N. Y., 60; *Worsly v. Bisset*, 3 Doug., 58.) There were sufficient allegations in the indictment of appointment, authority and jurisdiction in the referee. (*People v. Golden*, 3 Parker, 330; *People v. Powers*, 6 N. Y., 50, 52; *Bennac v. People*, 4 Barb., 35; *Regina v. Lawler*, 6 Cox Cr. Cas., 187; *Lavey v. Queen*, 5 id., 269.) The remainder of the allegations or statements were surplusage, and are required by statute to be disregarded. (2 R. S., 728, § 52, sub. 4; 2 Edm. St., 751; *People v. Phelps*, 6 Hun, 401, 412, 423, 424; *People v. Phelps*, 6 id., 436.) If the court actually makes an order it is valid as such, even though it be not evidenced by any written order. (*Wheeler v. Falconer*, 7 Rob., 45, 49; *People v. Central City Bank*, 53 Barb., 412; *Regina v. Justices*, 9 Best & Smith, 288; *Clarke v. Tyne, etc.*, L. R. [3 C. P.], 230.) A mere failure to enter the order in the clerk's office does not affect its validity or render it invalid. (*McKinley v. Weber*, 37 Wis., 280, 284, 285.) The alleged variance was immaterial. (*Harris v. People*, 64 N. Y., 148, 154.) The will not being found, it was proper to account for its absence and show its destruction by the testator. What he said was a part of the transaction itself, and showed his intent to destroy the will. (*Adams v. Angell*, 5 Ch. Div., 634; 22 Eng. Rep., 369; *Waterman v. Whitney*, 11 N. Y., 157, 162; *Betts v. Jackson*, 6 Wend., 173; *Gibbs v. Huyler*, 41 N. Y. Sup. Ct. R., 190; Mass., etc., 63 N. Y., 190-194; *Jackson v. Kniffin*, 2 J. R., 31, in 3 American Decisions, 395; *Bibb v. Thomas*, 2 W. Bl., 1044; *Doe v. Perkes*, 3 Barn. & Ald., 489; *Dan v. Brown*, 4 Cow., 483; *People v. Davis*, 56 N. Y., 102; 1 Greenl. Ev. [13th ed.], §§ 108, 109;

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Hunter v. The State, 40 N. J. Law Rep., 493; 40 id., 527-530, 534-540; Phillips on Ev. [1 Phil. on Ev., Cow. & Hill's and Edward's notes, ed. 1868], 185; note 80 of Cow. & Hill's, and Edward's notes on Phillips on Ev. [1 Phil. on Ev., ed. 1868], 150; Wood's notes to Best on the Law of Ev. [2 Best Ev., ed. 1876], 876; *Antaugua County v. Davis*, 32 Ala. [RICE, C. J.], 703; *Pitts v. Burrows*, 6 Ala., 733; *State v. Howard*, 32 Verm., 380; *Regina v. Edwards*, 12 Cox C. C., 230; see, also, *West v. Price's Heirs*, J. J. Marsh, 380; *Russell v. Frisbee*, 19 Conn., 206, 208-211; *Third, etc., v. Hall*, 1 Baxter [Tenn.], 479; *Alern v. Goodspeed*, 72 N. Y., 108; *Stiles v. State*, 57 Geo., 184; *Bartholemey v. People*, 2 Hill, 248.) The law presumes that a will, not found by the proper persons after death of the testator, was destroyed by him *animo revocandi*. (*Knapp v. Knapp*, 10 N. Y., 276; 16 Eng. Rep., 544.) The court properly sustained the people's objection to the offer to prove the alleged declarations of the testator to witness Merrick. They did not accompany any act of the testator, and were not admissible as *res gestæ*. (*People v. Davis*, 56 N. Y., 102; *Waterman v. Whitney*, 11 id., 157; 1 Greenl. Ev. [13th ed.], § 110; *Doe v. Palmer*, 17 Q. B. [71 Eng. Law and Eq.], 164; *Swift v. Mass., etc.*, 63 N. Y., 193, 194; 1 Greenl. Ev., § 110; *Felt v. Amidon*, 43 Wis., 467; *Svenson v. Dundas*, 42 id., 642; *Lund v. Lynesborough*, 9 Cush., 36; *Meek v. Price*, 36 Miss., 261-265; *Enos v. Tuttle*, 3 Conn., 250; *Dawson v. Hall*, 2 Mich., 390, 393.) It was proper to prove the appointment of the administrators. (16 Eng. Rep., 544, note and cases cited; *John Hancock, etc., v. Moore*, 34 Mich., 41; *Sewell v. Cohoes*, 11 Hun, 626, affirmed 7 Weekly Digest, 571; *John Hancock Mutual, etc., v. Moore*, 34 Mich., 41.) Where a party attempted to obtain false testimony, that fact may be proved as evidence of guilt, for it is to be presumed an innocent party would not do so. (*Adams v. People*, 9 Hun, 89, 94, 95; *Collins v. Commonwealth*, 12 Bush [Ky.], 271, 272; *Morgan v. Frees*, 15 Barb., 352; *Smith v. Newton*, 84 Ill., 15; *Green*

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v. *Town of Woodbury*, 48 Vt., 5; 1 Greenl. Ev., § 459; 1 Bish. Cr. Law [6th ed.], § 468; *Kenter v. State*, 45 Ind., 178, 179; *Com. v. W——*, 3 Pittsburg Rep., 462, 466, 467.) It is true that the law requires more than what is equivalent to the testimony of one witness, but it does not require more than the testimony of one witness and some additional corroboration. (1 Greenl. Ev., § 257; *Hopkins v. Smith*, 3 Barb., 602; *People v. Burden*, 9 id., 468–476; *Com. v. Parker*, 2 Cush., 213, 222, 224; *State v. Raymond*, 20 Iowa, 583, 586–588; *Regina v. Hook*, Dearsly & Bell, 606, 614–616; *U. S. v. Wood*, 14 Peters, 430, 437–444; *Woodbeck v. Keller*, 6 Cow., 118; *Regina v. Shaw*, Leigh & Cave, 590.)

MILLER, J. A writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken upon the trial (*Donahue v. The People*, 56 N. Y., 211); and no exception lies to a refusal to postpone a criminal trial by reason of the absence of witnesses: (*Commonwealth v. Drake*, 124 Mass., 21, 24; *The Same v. Donovan*, 99 id., 425.)

Assuming that the question raised as to the refusal of the court to postpone the trial is presented for review upon the writ of error, we are unable to see that any error was committed. The decision of questions of this nature rests very much in the sound discretion of the trial court; and unless it is entirely apparent that such discretion has been abused, there is no lawful ground for interference by a higher tribunal.

The affidavit upon which the application to postpone was made, in the case considered, presented no extraordinary facts, and it was fairly to be inferred for what purposes the witnesses named were designed. One of them manifestly was a subscribing witness to the will of Alfred Eighmy, deceased, the father of the defendant, about whose will the controversy arose, and there was no question in regard to the execution of such will. The other was acquainted with a witness for the People upon the trial of the indictment, and

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probably intended to impeach the character of such witness. This could be done quite as well by other witnesses, and hence his testimony was not of such a vital character as to render his attendance indispensable. Without additional proof to establish that these witnesses were absolutely essential for the defense, no good reason was shown for a postponement. Aside from the considerations suggested, it does not appear that a subpoena had been taken out or any effort whatever made to secure their attendance, or that this might not have been done by proper exertions. The allegation that a civil action was pending involving the facts in regard to which the perjury was committed, was not a sufficient ground for the postponement of the trial. The perjury alleged was committed in a case where a reference had been ordered on default, a decision been had, and a judgment entered. A conviction for perjury, therefore, could have no effect upon the decision of the referee. The reason given for the rule in the English courts, that the policy of the law forbids that a witness in a civil action pending should be made infamous through a conviction for perjury, obtained upon the testimony of a party to the suit while pending (Russ on Cr. [1 Am. ed.], 654; Wharton Cr. L., § 2280) has, therefore, no application. The most which can be claimed, under such a state of facts, is that it was a matter of discretion, and as it is not apparent that such discretion was improperly exercised, a higher tribunal could not interfere, even if it had the power to do so.

The objection that the indictment does not aver the commencement and pendency of the civil action in which the prisoner was sworn, so as to give the court jurisdiction of the subject-matter of the persons and parties, is not sustained. The indictment charges that a referee was duly and legally appointed in an action then pending in the Supreme Court of the State of New York, naming the parties; and this, we think, was a sufficient statement to show that the court had jurisdiction of the parties.

The objection that the indictment was defective because

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the order of reference under which the referee acted does not appear by the indictment to have been made by the court in which the action was pending, but by an *ex parte* chamber order of the judge, is without merit. It will be noticed that the indictment avers that Verbeck "being a referee duly and legally appointed in the action by the Hon. JOHN S. LANDON, one of the justices of the Supreme Court, by an order duly made * * * in said action at the chambers of said justice in the city of Schenectady, said Verbeck was appointed as referee to take proof of all the material facts, * * * and being then and there duly authorized and qualified to execute the duties of the office of referee, * * * and then and there duly empowered and authorized to administer oaths in that behalf, and duly empowered to administer such oath," etc. These allegations show that the referee was lawfully appointed in the action, that such appointment was duly made by the order of a judge having authority for such a purpose at his chambers, and that the referee was authorized and qualified to act as such, and, I think, were sufficient. It is to be presumed that the judge acted according to law; and as he had a right to hold a Special Term at his chambers, and the appointment is averred to be lawfully made, the legitimate inference is that it was done at Special Term. The case is different from one where there is an entire want of authority of the court or the officer; and although the indictment must show jurisdiction strictly, I think it sufficiently appears from the facts stated therein. This rule should especially apply where the court is one of general, and not of special jurisdiction: (*People v. Powers*, 6 N. Y., 50, 52; *People v. Golden*, 3 Park. Cr., 330.)

It is not necessary, even in an indictment for perjury committed before an inferior court, to set out all the facts to show authority of such court of limited jurisdiction, and it is sufficient to aver that it had sufficient and competent authority to administer the oath: (*Reg. v. Lawler*, 6 Cox Cr. Cas., 187; *Lavey v. The Queen*, 5 id., 269.) Much

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less is so great a degree of exactness required where the averment relates to a court of general jurisdiction. The case considered differs from one where the indictment charges the perjury to have been committed in an action pending, and that the referee was appointed by a court which has no legal existence, as was the case in *Geston v. The People* (4 Lans., 487).

It is said that the order of reference must be made by the court and actually entered, before the referee has jurisdiction to administer the oath. I think it was sufficient to establish that it was the order of the court that a copy was inserted in the judgment-roll. It is enough that the court actually made the order : (*People v. Central City Bank*, 53 Barb., 412; *Wheeler v. Falconer*, 7 Rob., 45, 49.) In *Bonner v. McPhail* (31 Barb., 107, 115) — which is relied upon by the prisoner's counsel — it appeared affirmatively, upon the plaintiff's own proof, that at the time when the slanderous words were uttered for which the plaintiff sought to recover damages, the person before whom the case was tried was not a referee in the action, and he had no authority to administer oaths and examine witnesses. We think proof of the entry of the order was not required; and if it was actually granted, it was enough, and was not invalid.

The objections to the evidence showing that the testator burned the will, and to his declarations accompanying the alleged act, were not well taken. The object of the evidence was to contradict the testimony of the prisoner, in reference to which the alleged perjury was committed, which was in substance that Alfred Eighmy, Jr., had told him that he had taken charge of all the private papers of Alfred Eighmy, deceased, and in moving them he had lost some of them and had lost the will; and that the prisoner had requested the said Alfred Eighmy, Jr., to make an affidavit to the fact that he had lost the will, so as to use it in establishing said will as lost. The proof would tend strongly to corroborate the testimony of Alfred Eighmy, Jr., and to establish the alleged perjury. The rule is well established, that anything

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said accompanying the performance of an act, explanatory thereof or showing its purpose or intention, when material is competent as a part of the act : (1 Greenl. on Ev. [13th ed.], §§ 108, 109; Wharton on Ev., 262; *People v. Davis*, 56 N. Y., 102.) Such declarations constitute a part of the *res gestæ* and are admissible as such : (*Waterman v. Whitney*, 11 N. Y., 157, 162.) In the case last cited the rule is laid down, that upon a question of revocation no declarations of the testator are admissible, except such as accompany the act by which the will is revoked, and for the purpose of showing the intent of the act. (See also *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y., 190.)

The proof given showed that the testator proceeded to his sleeping room, brought out his private papers, which were in a small tin trunk, and took the papers out of the trunk. Among them was one in its appearance like a sheet of foolscap writing paper folded in law form, to which a seal was attached. He opened it, apparently read it, and it remained in his hands for some ten or fifteen minutes. He then folded it up and put it in the stove, where it was burned up and destroyed. He, at the time, said that it was his will, stated what provisions it contained, and gave as a reason for destroying it that his son had not done as he agreed to do. Taking into consideration that there was proof besides the evidence objected to that the deceased had executed a will containing the same provisions as those which he stated were in the paper destroyed by him, which was in his possession while alive, and which was not found after his death ; that the paper destroyed was kept among the private papers of the deceased ; the manner in which it was folded, and the seal attached thereto ; there was certainly some evidence to establish that the paper destroyed was the will of the deceased. This was a legitimate inference from the circumstance referred to, and in connection with the declarations of the deceased, constituted a part of the *res gestæ*. Although not conclusive, the facts proven at least furnish some evidence on the subject, and hence there was no error

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in the admission of the testimony. The line is a very close one between the proof of a particular act indicating the intention of a party, or of circumstances from which a legal inference may be drawn that such act did take place ; but we think the evidence introduced may be upheld within many of the reported decisions : (See *Hunter v. The State*, 40 N. J. L. R., 495; 1 Ph. on Ev. [C. & H. & Edw.'s notes, ed. of 1868], 185; *Antaugua Co. v. Davis*, 32 Ala., 703; *Pitts v. Burrows*, 6 id., 733; *State v. Howard*, 32 Vt., 380; *Reg. v. Edwards*, 12 Cox Cr. Cas., 230.) The competency of the evidence given is also supported by the presumption of law that a will proved to have existed, but not found by the representatives of the deceased after the testator's death, was destroyed by him *animo revocandi* : (*Knapp v. Knapp*, 10 N. Y., 276.)

The offer to prove the declarations of the deceased after the alleged destruction of the will, was properly overruled for the very apparent reason that such declarations were not accompanied by acts, and in no way constituted a part of the *res gestæ*. The distinction between the two classes of cases is quite obvious ; and as declarations are only admissible for the purpose of showing the intent, when they accompany an act by which a will is revoked, it follows that they are incompetent, when made alone, without such act. When declarations offered are merely a narrative of past occurrences, they are incompetent : (1 Greenlf. on Ev., § 110; *People v. Davis*, *supra*; *Waterman v. Whitney*, *supra*.)

It was also competent for the prosecution to show that when Alfred Eighmy signed the affidavit sworn to by him, he was imposed upon by the prisoner, and his signature obtained by the substitution of one paper for another which had been read to him, the last of which contained a clause which was not in the first paper. The prisoner had testified before the referee that Alfred Eighmy, Jr., had made an affidavit at his request, in which he stated certain matters, and he in part based his testimony on this affidavit, which was produced. It was proper to prove what affidavit was

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referred to and its contents, and the manner in which it was obtained; that in fact Alfred never swore to the affidavit as presented, for the purpose of showing the perjury of the prisoner in regard to the affidavit Alfred had made; and what Alfred actually swore to. It was also competent to show that Alfred never swore, in the affidavit he intended to sign, to what the prisoner testified he had, for the purpose of proving that he did not believe the will to be lost; and that he never had the information contained in the fraudulent affidavit, which information the prisoner swore he had obtained from him. The testimony of Freeman was also competent, as it bore upon the same subject.

The judgment-roll was also properly admitted in evidence to show what proceedings had been taken, and the referee's evidence does not appear to be open to any valid objection. The petition and letters of administration also constituted a material part of the evidence and are not liable to objection.

The refusal of the court to compel the public prosecutor to furnish to the prisoner's counsel the evidence before the grand jury, was a matter resting in the discretion of the court, and is not the subject of review upon this writ of error.

We are also of the opinion that the evidence was sufficient to sustain the conviction of the prisoner, having in view the rule applicable to cases of perjury, that the evidence of one witness or oath against oath is not enough, and that the testimony of a single witness for the prosecution should be corroborated. This question is sufficiently considered in the opinion of the General Term by LEARNED, J., and further comment is not demanded.

For the reasons given the judgment of the General Term should be affirmed.

All concur, except CHURCH, Ch. J., and DANFORTH, J., dissenting.

Judgment affirmed.

LONG ISLAND CITY, Appellant, v. THE LONG ISLAND RAILROAD COMPANY, Respondent.

The charter of Long Island City (chap. 461, Laws of 1871, tit. 3, chap. 1, § 14) gives its common council power to regulate the use of streets by vehicles and railways, and to enforce obedience thereto by penalties, with the reservation that it shall have no power to prohibit or control, in any manner, the use of steam power on any railroad from any part of Long Island to the East river; and it is declared that such railroad companies shall have unobstructed right to run to the East river, "but shall furnish suitable guards or signals at the street crossings." The common council passed an ordinance requiring railroad companies running cars drawn by steam power, within the city limits, to place flagmen at every crossing; and for every violation of the ordinance imposed a penalty of fifty dollars. Defendant's road was constructed and in operation before the enactment of the charter. Its road passed through the city to the East river, crossing one of the city streets. In an action to recover a penalty for not placing a flagman at the crossing, *held*, that plaintiff was not entitled to recover; that it had no control over the defendant's road, and its common council had no power to regulate by ordinance the duty imposed upon defendant to furnish proper guards and signals.

(Submitted December 8, 1879; decided January 13, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of defendant, entered upon a decision of the court on trial without a jury. (Reported below, 8 Hun, 58.)

This action was brought to recover a penalty for an alleged violation of an ordinance passed by plaintiff's common council.

The facts appear sufficiently in the opinion.

J. Ralph Burnett, for appellant. The power to regulate the use of streets, highways, roads and public places, by foot passengers, vehicles and railways, is a police regulation necessary for the public safety, and forms a vital part of the internal polity of cities. (Tit. 3, chap. 1, § 14, sub. 5, Laws of 1871, chap. 461; 2 Redfield, Law of Railways, 564; *Buffalo and Niagara Falls R. R. Co. v. The City of Buffalo*,

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5 Hill, 209; *Commonwealth v. The Old Colony and Fall River Railroad Company*, 14 Gray, 93.) The special franchise conferred upon Long Island City by its charter, as to regulating "the use of streets, highways, etc., by railways," etc. (sub. 6, § 14, chap. 1, tit. 3, charter), is, so far as it extends, a grant of sovereignty, and must prevail within the city limits to the exclusion of the general State laws. (*The State v. Clark*, 1 Dutch, 54; Noy's Maxims, 19; *State v. Branin*, 3 Zab., 485; *Goddard Case*, 16 Pick., 504.) The defendant cannot claim immunity from local municipal regulations, because it is incorporated and operating under the general railroad law. (*Culbertson v. Southern Belle*, 1 Newb., 461; *Renny v. New Orleans*, 15 La. Ann., 657.) A municipal corporation is authorized to legislate on subjects, already, to some extent, regulated by general statute, and may impose new and additional penalties for acts already penal by the State law. (*City of Brooklyn v. Toynbee*, 31 Barb., 282; *Rogers v. Jones*, 1 Wend., 237; *Williams v. Inhabitants of Leeds*, 51 Maine, 313.)

Edward E. Sprague, for respondent. Section 19 of title 11 of plaintiff's charter, exempts defendant from the exercise of the power of the common council, to regulate the use of streets by railways. (*Gibbons v. Ogden*, 9 Wheat., 1, 196; *id.*, 211; *Cherokee Nation v. State of Ga.*, 5 Peters, 1, 44.) Not only the general power of regulation, but this particular ordinance, conflicts with the provision which vests in defendant an unobstructed right to run to the East river. (*McGrath v. N. Y. C.*, 63 N. Y., 522; *McGovern v. N. Y. C.*, 67 *id.*, 417.) The ordinance cannot be sustained from the provision of the charter that such railroad companies shall furnish suitable guards or signals at the street crossings. (*The People v. Albany and Vermont R. R. Co.*, 24 N. Y., 261; *The People ex rel. Green v. Dutchess and Columbia R. R. Co.*, 58 *id.*, 152.) The ordinance is void for the further reason that the penalty exceeds the limitation prescribed by the charter. (*Dickenson v. Fletcher*, 9 L. R. [C.

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P.], 1; *State v. Moultrieville*, Rice [S. C.], Law, 158. *A fortiori*, in the case of mere neglect or omission. (*Crepps v. Durden*, Cowp., 640; *Mayor of N. Y. v. Ordrenan*, 12 J. R., 122; *Grand Rapids v. Hughes*, 15 Mich., 54.)

EARL, J. The charter of Long Island City (chap. 461 of the Laws of 1871, tit. 3, chap. 1, § 14) contained the following provisions: "The common council shall have power to make, continue, modify and repeal such ordinances, regulations and resolutions as may be necessary to carry into effect any and all of the powers now vested in, or by this act conferred upon the corporation, and shall have power to enforce obedience thereto by ordaining penalties for each and every violation thereof, in such sums as it may deem expedient, not exceeding one hundred dollars. And shall have power to make such ordinances and with such penalties in the matters and for the purposes following:

* * * * *

"5. To regulate the use of streets, highways, roads, and public places by foot-passengers, vehicles, railways." Subsequently in the charter is also found the following provision: "Nothing in this act shall be construed as granting to the mayor or common council of said city, or either of them, or to any officer of said city, power to prohibit or control in any manner the use of steam power on any railroad from any part of Long Island to the East river, and such railroad companies shall have unobstructed right to run to the East river with their locomotives and cars, but shall furnish suitable guards or signals at the street crossings, for the proper protection of the public."

On the 1st day of September, 1874, the common council of the city, claiming to act under the provisions first above given, passed the following ordinance: "§ 1. Any railroad company or corporation running cars drawn by steam power within the limits of Long Island City shall station a flagman at all points where the tracks of such company or corporation cross a public highway, street, avenue, road or public place

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within said city, on an even grade with such public highway, street, avenue, road or public place, whose duty it shall be to warn all persons passing over or using such public highway, street, avenue, road or public place, of the approach of trains.

“ § 2. Any railroad company or corporation violating this ordinance, or refusing or neglecting to carry out its provisions, shall be liable to a penalty of fifty dollars for each and every day it shall be violated, or they shall refuse or neglect to carry out its provisions as aforesaid.”

The defendant's road was constructed before the enactment of plaintiff's charter, and was in operation upon Long Island to the East river. It passed through the city and crossed one of the streets thereof upon an even grade with the street. The defendant did not station a flagman at the crossing, and this action is brought to recover one penalty imposed by the ordinance.

We think the plaintiff was properly defeated in the courts below. The general power conferred upon the city by the first provision is limited and controled by the last provision. By the last, such railroad companies as the defendant were taken out of the control of the city and secured the unobstructed right to run their cars to the East river. It is true that they were to furnish “suitable guards or signals” at street crossings. They could do either; and what the guards or signals should be, they could determine, provided they were suitable for the purpose intended. If they omitted the duty thus imposed, they could be compelled by the courts to perform it, or they could probably be indicted for the omission. But the common council had no power to regulate this duty by ordinance.

Here there was no proof nor, so far as I can discover, any claim that the defendant had not furnished suitable “guards or signals” at the crossing; and if it had, the plaintiff certainly had no right to impose upon it the additional burden of keeping a flagman there.

Taking the two provisions together, it is clear that it was intended by the Legislature to confer upon the common

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council the power to regulate the use of the streets only by street railways and other railways not running to the East river. It was doubtless deemed prudent to commit to the common council some control over such railways. But railroads upon which steam power was used, and which, by running to the East river, were the main arteries of commerce and travel, were not subjected to such control. The trains upon such roads are required to be run without interruption, with great regularity and speed. Such roads are subject to the general railroad laws of the State as to signboards and signals at street crossings, besides the particular provisions contained in this charter as to such crossings. There seems to be no necessity to subject such roads to municipal control, and it is not the general policy of the State to do so.

The judgment should be affirmed, with costs.

All concur, CHURCH, Ch. J., concurring in result.

Judgment affirmed.

ISAAC J. GEERY et al., Executors, etc., Appellants, v.
WILLIAM GEERY, Survivor, etc., Respondent.

In an action for an accounting, brought by the executors of a deceased partner against the surviving partner of a firm, a judgment was rendered directing defendant to pay over to a receiver a specified sum, and to turn over to him the partnership assets remaining, out of which the receiver was directed to pay plaintiffs, a sum stated, and to divide the residue; thereupon a judgment was docketed in favor of plaintiffs, against defendant, for the amount the latter was required to pay; on motion to vacate the docket in this particular, *held*, that it was not authorized by the judgment, and was properly vacated; that the docket, if any was authorized, should have been in favor of the receiver; that it was not sufficient that it appeared, plaintiffs would be entitled to as large or a larger sum when the judgment is fully carried out; there was no personal money judgment between the parties, the money required to be paid the receiver was partnership money, and the demand of plaintiffs was to be paid by the receiver from firm assets.

(Argued January 13, 1879; decided January 20, 1880.)

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APPEAL from order of the General Term of the Court of Common Pleas, in and for the city and county of New York, affirming an order of Special Term, which vacated and set aside a docket of a judgment in favor of the plaintiffs herein, against defendant, and a transcript of said judgment and docket thereof in the office of the clerk of the city and county of New York.

This was an action for an accounting brought by plaintiffs as executors of Isaac Geery, late of the firm of I. & W. Geery, against the surviving member of that firm.

The judgment directed defendant to pay over to the receiver appointed in said action the sum of \$56,812.38, and to deliver and transfer to him the other property and assets belonging to the firm, in his hands; that the receiver sell the assets and after paying expenses, etc., to pay to plaintiffs the sum of \$82,308.10 and interest, if the assets are sufficient for that purpose; if any surplus the same to be divided between the parties; if a deficit the receiver was required to report the amount thereof, and upon the coming in and confirmation of the report, judgment for one half the amount was directed in favor of plaintiffs against defendant.

The judgment-roll was filed June 26, 1873, and an entry was then made in the docket of judgments, of the names of parties and the time of filing the roll. Afterwards, on January 13, 1876, the clerk of the court, at the request of plaintiffs' attorneys, docketed a judgment for \$56,812.38 in favor of plaintiffs against defendant, a transcript of such docket was filed and judgment was docketed in the office of the clerk of the city and county of New York.

Amasa J. Parker, for appellants. There was no irregularity in the entry of the judgment, it was properly docketed on the judgment given by the court, and was final. (*Morris v. Morange*, 38 N. Y., 179; *Geery v. Geery*, 63 id., 252; *Produce Bank v. Morton*, 67 id., 199, 203; *Gray v. Cook*, 24 How. Pr., 432; *Sears v. Burnham*, 17 N. Y., 445, 447; *Hunt v. Grant*, 19 Wend., 90.)

Opinion of the Court, per CHURCH, Ch. J.

F. J. Fithian, for respondents. No money judgment could have been docketed at all, except by an order of the court, and then only in favor of the receiver. (*Geery v. Geery*, 63 N. Y., 252, 253.) A test of a right to docket a judgment, is a right to issue execution upon it immediately. (*De Agreda v. Mantel*, 1 Abb. Pr. R., 135.) The receiver alone can enforce the judgment, so far as its relates to the payment to him of said sum of money. (*Troy City Bank v. Bowman*, 19 Abb. Pr. R., 16.) The clerk had no power to alter or amend the original docket of June 23, 1873. (3 R. S. [5th ed.], 723, § 9.)

CHURCH, Ch. J. Without discussing the finality of the judgment, or the power of the clerk to amend the docket three years after the original entry of judgment was made, by inserting the sum of \$56,812.38, we are of opinion that the judgment in this case did not authorize the docket of a judgment for any amount in favor of the plaintiff against the defendant. The docket, if any was authorized, should be in favor of the receiver, and this was held in *Geery v. Geery* (63 N. Y., 252, 255). —

There was no judgment that the plaintiff recover any sum from the defendant, nor that the defendant pay to the plaintiff any sum whatever.

The action was for an accounting between partners. The judgment in adjusting these accounts requires the defendant to pay to the receiver the sum recovered, and makes it the duty of the receiver to convert certain real estate and personal property into money, and from the aggregate amount to pay the plaintiff a specified amount owing to him by the firm, and the balance to divide equally between the parties. The sum which the defendant was required to pay to the receiver, together with the avails of the property, were partnership assets to be administered and paid by the receiver, according to the terms of the judgment, and the plaintiffs had no authority to intervene and override the provisions of the judgment. It is not sufficient that it appears that the

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plaintiffs will be entitled to as large or a greater sum than that named, when the judgment is fully carried out; the question is, whether there is any adjudication upon which to base the docket of a recovery in favor of the plaintiff against the defendant. The money required to be paid to the receiver was partnership money, and the demand of the plaintiffs' testator was against the firm, and the receiver was directed to pay it from firm assets. There was no personal money judgment between the parties.

The order should be affirmed.

All concur, except DANFORTH, J., not voting.

Order affirmed.

THE MUTUAL LIFE INSURANCE COMPANY, v. JAMES BIGLER, Appellant, THE NATIONAL BANK OF NEWBURG, Respondent.

In an action for the foreclosure of a mortgage, after judgment, and a sale in pursuance thereof, and while awaiting the confirmation of the court for the payment of the purchase money and the delivery of the deed, the court has authority on the petition of the purchaser to restrain the mortgagor from committing waste.

The petition of the purchaser in such a case showed that the mortgagor was threatening to remove certain machinery from a mill upon the premises, which machinery the petitioner claimed to be part of the realty. *Held*, that an order restraining the mortgagor from removing the machinery until the confirmation of the report of sale and the receipt of the deed by the purchaser was proper; but that it was not necessary to adjudge the question as to whether the articles of machinery were fixtures passing with the land; that this was a question which should not be adjudged summarily on a motion. Leave therefore granted to either party to bring an action to determine that question.

(Argued January 13, 1880; decided January 20, 1880.)

THIS was an appeal from an order of the General Term of the Supreme Court, in the second judicial department, affirming an order of Special Term, granted on the petition of

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defendant, the National Bank of Newburgh, purchaser on foreclosure sale herein, to the effect that certain articles of machinery specified are part and parcel of the real estate sold; and restraining the defendant James Bigler, the mortgagor, from removing the same or any part thereof from the premises, and from committing any waste thereon.

The petition stated in substance that the action was commenced to foreclose a mortgage executed by said James Bigler and wife to plaintiff; that a judgment of foreclosure and sale was entered, in pursuance whereof the mortgaged premises were sold by the referee appointed for that purpose; that the petitioner became the purchaser and paid ten per cent of the purchase price as required by the terms of sale, but had not obtained possession; that upon said premises there is a steam saw and planing-mill, which is still in the possession of the mortgagor, in which mill are certain articles of machinery attached to the buildings and forming part of the real estate purchased; that since the sale the mortgagor has claimed that said machinery and fixtures are personal property and has threatened to remove the same before the petitioners can obtain possession. The petition was accompanied by an affidavit stating the method in which the machinery was attached to the building. The answer of Bigler to the petition denied that the machinery in question was part of the realty, but alleged that the various articles specified were placed in the mill after the execution of the mortgage and without the intention to make them fixtures, and were in fact personal property.

Theodore F. Miller, for appellant. There was no jurisdiction to grant the injunction (*Erie Railway v. Ramsay*, 45 N. Y., 645; *Brown v. The Keeny S. C. Ass.*, 59 id., 243.) Since the Code (§ 602), abolishing the writ of injunction, the court can only grant an injunction by order in an action where the right to it "depends upon the nature of the action." There must be a complaint, showing a right to final relief; and it must demand an injunction as a

Opinion of the Court, per FOLGER, J.

part of the relief sought. (Code, § 603; Bliss' Code, 474; *Hovey v. McCrea*, 4 How. Pr., 31; *Olsen v. Smith*, 7 id., 481; *Hulce v. Thompson*, 8 id., 475; *Mattice v. Gifford*, 10 Abb. Pr., 246; *Morgan v. Quackenbush*, 22 Barb., 72; *Springsteen v. Powers*, 4 Robt., 624; *Fellows v. Heermans*, cited in 45 N. Y., 645; *Gentil v. Arnaud*, 38 How. Pr., 94.)

Samuel Hand, for respondent. It is doubtful whether the purchaser could maintain an action for waste in his own name until the report of sale had been confirmed and the deed received. (*Strong v. Dollner*, 2 Sandf., 448; *Paine v. Miller*, 6 Ves., 349; *Cheney v. Woodruff*, 45 N. Y., 98; *Mitchell v. Bartlett*, 51 id., 447.) The purchaser was entitled to the injunction applied for. (Code, § 604; *Kershaw v. Thompson*, 4 J. Ch., 609; *Ludlow v. Lansing*, Hopk., 231.)

FOLGER, J. The proofs presented by the petitioner, are sufficient to show that there was reasonable ground for the claim of the petitioner, that the articles which Bigler was seeking to take away from the mortgaged premises were so put thereon as to become part thereof and pass therewith under the foreclosure sale. But it was not necessary to the immediate relief sought by the petitioner to finally adjudge that question; nor do we think that it should be adjudged summarily upon a motion. It was enough to hold that there was sufficient ground for restraining any change in the condition of the property claimed by the purchaser, until he could bring a proper action to determine the question of title.

Without passing upon the question whether or not the court had in strictness the power under the present Code to make the injunction order thereby provided for upon the case presented by the papers, we think that it had the power on general principles, and by the practice heretofore in use, to stop unauthorized interference with the mortgaged property, in the position in which it was when the petition was brought to the court. The 468th section of the former

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Code was not repealed by the repealing statute : (Chap. 417, Laws of 1877, § 1, sub. 4.) By it, in case an action cannot be had under the Code, the practice heretofore in use may be gone back to, so far as needful to prevent a failure of justice.

Now, in the case in hand, the suit for the foreclosure of the plaintiff's mortgage was a proceeding *in rem*, or in the nature thereof. It had gone so far as that the *res* was in the actual control of the court ; the rights of all parties in it had been extinguished by the judgment, except so far as saved by it ; it was in the hands of the officer of the court ; it had been put up for sale by him, whereby to make a fund in money to be distributed by him and by the court ; a bid for it had been made and taken ; and it awaited only the confirmation by the court for the money to be paid and a deed made. Surely the court had a right, from its inherent powers and according to former practice in equity, to forbid and restrain acts by any party to the suit, which would take away from the control of the court the very thing upon which it had adjudicated, and which it then had in possession for bestowal upon a purchaser, in exchange for his money, with which to carry out the judgment it had rendered. It could do so in this suit, after judgment of foreclosure, on petition. Though a bill does not pray for an injunction, and one may not be moved for under the prayer for general relief, yet after a decree of foreclosure, if the mortgagor attempt to cut timber, the court will enjoin him ; after a decree for a sale, it will not permit any one to cut timber in the meantime : (*Wright v. Atkyns*, 1 Ves. & Beames, 313.) So, where after decree the mortgagor who was in possession began to pull down the house : (*Goodman v. Kine*, 8 Beav., 379.) And it seems that the court may be moved thereto, by a defendant in the suit, upon petition and notice : (*Barlow v. Gains*, id., 329 ; and see *Paxton v. Douglass*, 8 Ves., 519 ; *Mocher v. Reed*, 1 Ball & B., 318 ; *Wedderburn v. Wedderburn*, 2 Beav., 208.) So, where a purchaser was doing waste, not having paid the purchase

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money, though not a party to the suit, he was restrained on motion of the plaintiff made in the suit: (*Casamayor v. Strode*, 1 Sim. & Stew., 381.) So, a tenant of a receiver of the court, not a party, was by summary order restrained from removing farm products from the premises, for the reason that so to do was contrary to the custom of the country: (*Walton v. Johnson*, 15 Sim., *352.)

We think, therefore, that the court below had the power, and did not abuse discretion in the use of it, so far as it restrained Bigler from interfering with the property until the court should confirm the report of sale of the referee, and the purchaser should be put into possession of the mortgaged premises. There are phrases in the order appealed from that may be construed as going further than that; as making a final determination against Bigler of the question of whether or not these things were fixtures passing with the title to the land on which they stood; and as making a perpetual restraint upon him from ever asserting a right to the ownership and possession of them. It ought not to do more than to hold that a sufficient *prima facie* case is presented to render a removal of the property in dispute improper while the sale is still incomplete and the mortgaged premises are under the control of the court. The order should be modified so as to restrain the defendant Bigler from removing the property alleged to be fixtures, or any part thereof, until the purchaser receives the deed from the referee and the report of sale is confirmed; but without prejudice to the right of either party to bring an action to try the question whether such property passed by the sale, and without prejudice to that question; and so much of the order as adjudges that such property is part and parcel of the real estate, and that said defendant Bigler has no right to remove the same, should be stricken out.

All concur.

Ordered accordingly.

Opinion *per Curiam*.

BENJAMIN ANDREWS, Appellant, v. TIMOTHY LONG,
Respondent.

ELIZABETH A. ANDREWS, Appellant, v. TIMOTHY LONG,
Respondent.

The provision of the Code of Civil Procedure (§ 1342), in reference to appeals to the Supreme Court from orders of a County Court, confines the appellate jurisdiction to orders in actions originating in the County Court.

Accordingly, *held*, that an order of County Court dismissing an appeal from a judgment of a justice of the peace, was not appealable to the Supreme Court.

Andrews v. Long (19 Hun, 303), reversed.

(Argued January 13, 1880; decided January 20, 1880.)

APPEALS from orders of the General Term of the Supreme Court, in the second judicial department, affirming orders of the County Court of Kings county, which in each case dismissed an appeal to that court from a judgment of a justice of the peace. (Reported below, 19 Hun, 303.)

John Andrews, for appellants.

George Hill, for respondent. The appeal should have been dismissed by the Supreme Court, for the reason that the order of the County Court was not appealable, being from a judgment of a justice of the peace. (Code Civil Proc., §§ 1340-1345; § 3, subd. 1; *Beal v. Fitch*, 11 N. Y., 144.)

Per Curiam. We see no answer to the point made by the respondent, that the appeal to the Supreme Court, from the order of the County Court, dismissing the plaintiff's appeal to that court, should have been dismissed by the Supreme Court, for the reason that the order of the County Court was not appealable. The appellate jurisdiction of the

Opinion *per Curiam*.

Supreme Court over the judgments and orders of inferior courts is defined and regulated by sections 1340 to 1345 inclusive, of the Code of Civil Procedure.

The provisions of the Old Code on this subject were repealed by chapter 417, Laws of 1877. Section 1340 authorizes an appeal to the Supreme Court from a final judgment rendered by a County Court, or other court of record, where an appeal to a court other than the Supreme Court is not expressly given by statute. Section 1342 is as follows: "An appeal may also be taken to the Supreme Court from an order affecting a substantial right made by a court or judge in an *action brought in a court specified in the last section but one.*"

The courts so specified are "County Courts, or other courts of record," and the orders made by these courts, from which an appeal lies to the Supreme Court, are, by the express language of section 1342, orders made in an action brought in these courts.

The order of the County Court in this case, from which an appeal was taken to the Supreme Court, was not made in an action brought in the County Court, but in an action brought in a justice's court. The appeal from the judgment of the justice to the County Court, was not the bringing of an action in that court.

The language of section 1342 is plain and unambiguous, and confines the appellate jurisdiction of the Supreme Court, over the orders of the courts mentioned in section 1340, to orders in actions originating therein.

We are not at liberty to change the statute, or to extend it to cases not within its language and import, upon the suggestion that the Legislature did not intend to change the prior rule governing appeals from orders of inferior courts, when it has expressly abrogated the prior statute upon the subject.

The General Term instead of affirming the order, should have dismissed the appeal, and we think the proper disposition of the case here is to reverse the order of the General

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Term, without costs in this court, and to remit the case to the Supreme Court, to the end that an order may be there entered, dismissing the appeal to that court.

All concur.

Appeals dismissed.

JOHN M. COOK, Respondent, v. EDWARD M. JENKINS,
Appellant.

It seems that the provision of the Code of Civil Procedure (§ 974), in reference to the mode of trial when defendant interposes a counter-claim, and demands an affirmative judgment, and an issue of fact is joined thereon, applies only when the counter-claim sets up matter for which a separate action might be maintained.

In an action for a dissolution of a copartnership, and for an accounting between the partners, the answer alleged a violation on the part of plaintiff of a provision in the articles of copartnership, providing for a sale of the good will of the business to such of the partners as should bid the highest price, by his appropriating to himself the good will, and that the same was worth as an asset \$200,000, which he asked to counter-claim against any sum found due the plaintiff. As a further counter-claim the answer alleged a fraudulent misappropriation by plaintiff of partnership funds. *Held*, that the matters so set up did not present a counter-claim, of a separate and distinct cause of action, within the meaning of said section; that the matters set up were proper items to be proved upon an accounting; and that defendant was not entitled to a trial by jury thereon.

As to whether a separate cause of action could be maintained to recover the value of the good will, or for damages without an equitable accounting of the copartnership affairs, *quære*.

(Argued January 13, 1880; decided January 20, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming an order of Special Term, denying a motion to settle issues upon the counter-claims in the answer, and the reply, to be tried by a jury and referring the action.

This action was brought for the dissolution of a copart-

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nership, between the parties, and for an accounting as to partnership matters.

The substance of the answer is set forth in the opinion.

Leon Abbett, for appellant, Edward M. Jenkins. The order denying the motion to settle the issues for trial by jury should be reversed. (Code Civil Proc., §§ 970, 974; *Davis v. Morris*, 36 N. Y., 572.) When a complaint states facts giving an equitable cause of action, and also a legal cause of action arising out of the same transaction, the party is entitled to have both tried if necessary to obtain his rights, and either party has the right to a jury trial of the latter. (*Sternberger v. McGovern*, 56 N. Y., 21; *Hudson v. Carlyl*, 44 id., 553; *Kain v. Delano*, 11 Abb. Pr. [N. S.], 34 [Ct. App.]; *Townsend v. Hendricks*, 40 How. Pr., 171; *Davison v. Ass'n of Jersey City*, 71 N. Y., 340; *Davis v. Morris*, 36 id., 572; *Bryant v. Bryant*, 7 Robt., 48; *Evans v. Kalbfleisch*, 16 Abb. Pr. [N. S.], 16; *Pennsylvania Coal Co. v. Del. and Hud. Canal Co.*, 1 Keyes Rep., 72; *Davison v. Asso. of the Jersey Co.*, 71 N. Y., 340, ANDREWS, J.; *McKeon v. Lee*, 51 id., 306.)

Samuel Hand, for respondent. The order of reference was right and not reviewable by this court, whatever the character of the answer. It was a referable cause and could not be made the less so, because of any so-called counter-claim. (*Welsh v. Darragh*, 52 N. Y., 590; *Kingsley v. Brooklyn*, 1 Abb. [N. C.], 198; *Patterson v. Stettaner*, 7 Jones & Sp., 413; *Wood v. Hope*, 2 Abb. [N. C.], 186; *Townsend v. Hendricks*, 40 How., 143; *Vilmar v. Schall*, 61 N. Y., 564.) The appellant's counter-claim, itself, if presented in a separate suit, as alleged, is not of such a nature as to entitle the appellant, as a matter of constitutional or statutory right, to a trial by jury. (Story's Eq. Jur., §§ 679, 683, *Patterson v. Blanchard*, 6 Barb., 537; *Westerlo v. Evertsen*, 1 Wend., 532.) The order is also correct in refusing defendant's motion to settle issues, and was

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discretionary with the court below. (Code, §§ 971, 972; *Wood v. Mayor*, 4 Abb. [N. S.], 152; *Meneely v. Meneely*, 62 N. Y., 427; *Howe v. Searing*, 6 Bosw., 354.) The Code of Civil Procedure has not changed the rule. (§§ 970-974.)

MILLER, J. The provisions of section 974 of the Code of Civil Procedure no doubt are applicable to a case where a counter-claim is set up as a defense in the answer which presents an issue to be tried, often the only one in the case, upon which an affirmative judgment is demanded against the plaintiff, and for which a separate action might be maintained to recover damages of the plaintiff. Does the answer here set up any such defense?

The action is of an equitable character, based on the articles of copartnership, and the relief sought is an accounting or settlement of the copartnership accounts and a dissolution of the copartnership.

The defendant claims in his answer that he has sustained damages by reason of the plaintiff's violation of the thirty-third article of the copartnership agreement, which provided that the good will of the business should be sold to such of the partners as would within three calendar months bid the highest price for the same. The answer alleges that the plaintiff has disregarded this provision, and has appropriated to himself the good will of the business; that the good will as an asset was worth \$200,000, which sum he seeks to counter-claim, etc., against any sum which may be found due the plaintiff. It then proceeds to state, as a separate counter-claim, that the plaintiff fraudulently misappropriated partnership funds to a large amount, stating wherein this was done; that he fraudulently failed to pay over money, and defrauded defendants' firm of large amounts on certain accounts, and concludes with a general allegation that he appropriated the good will of the business, claiming to offset the same, and prays that an issue be framed and sent to a jury to determine the amount of damages due by the plaintiff to the defendant by reason of plaintiff's violation of the

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contract, which amount he claims should be allowed him in the accounting between the partners. The allegation as to the amounts appropriated are clearly matters for an accounting, which can be easily ascertained, and are properly within the scope and purpose of an equitable action of this character. As to the \$200,000, and a claim of \$12,500 for the good will, they are not so distinctly stated as to make out a cause of action *per se*. But they are commingled with other statements and allegations in reference to the transactions, which evince that they were considered and regarded by the pleader as connected with the accounting; and as they can only arise from a breach of the provision in the contract referred to, they sound in contract and are proper items which may be proved upon the accounting, and be set off against any sum found due the plaintiff. These matters present no counter-claim which shows a separate and distinct cause of action which entitles the defendant to a trial by jury. Had it been intended to claim damages for the fraudulent appropriation of the good will, or of the partnership funds or property, the answer should have so stated in a separate and distinct form, with proper allegations, so as to make out a cause of action for which a separate action might be brought. As we have seen, this is not done; and the entire pleading shows merely that the defendant presents his claims as a partner for adjustment upon the accounting, without any design to claim damages as an independent cause of action. Whether a separate action could be maintained to recover the value of the good will or for damages, without an equitable accounting of the copartnership affairs, it is not necessary to determine upon this appeal; and it is sufficient to say that no counter-claim is made out which demands that a separate issue should be made up for a trial by jury.

The order was right and should be affirmed.

All concur.

Order affirmed.

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LOUIS FLEISCHMANN, Appellant, v. JAMES GORDON BENNETT,
Respondent.

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109	344

A supplemental complaint should not be allowed upon an *ex parte* application.

Notwithstanding the mandatory language of the Code of Civil Procedure (§ 544), it is the duty of the court, upon the application, to consider all the circumstances, and to grant or refuse it, as may be just and proper in the particular case; such application therefore should be upon notice, so that both parties may be heard.

Where, upon the facts presented, the allowance of a supplemental pleading is in the discretion of the Supreme Court, the exercise of this discretion by the Special Term may be reviewed by the General Term, but not by this court.

(Argued January 13, 1880; decided January 20, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, reversing an order of Special Term, which denied a motion on the part of defendant to set aside an *ex parte* order allowing a supplemental complaint herein, and granting such motion.

The nature of the action and the facts appear in the opinion.

Edward T. Wood, for appellant. The order was properly had *ex parte*. (2 Wait's Pr., 570; Code of Civil Procedure, §§ 544, 545; *Fisk v. Susquehanna R. R. Co.*, 8 Abb. [N. S.], 309; *Palmer v. Murray*, 18 How., 545; *Lawrence v. Bolton*, 3 Paige, 294; *Eagan v. Price*, 2 id., 333; *Fisk v. Susquehanna R. R. Co.*, 8 Abb. [N. S.], 309; *Lawrence v. Bolton*, 3 Paige, 294; *Eagan v. Price*, 2 id., 333; *Walker v. Hallett*, 1 Ala., 379.) The right to a supplemental complaint, though depending somewhat upon the discretion of the court in a proper case, is absolute, as it was before the Code. (Code of Procedure, § 69; Code of Civil Procedure, § 544.) The judge at Special Term having allowed the supplemental complaint to be served, this court will only see

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that this discretion, if fairly exercised, is protected. (*Spears v. Mayer*, 62 N. Y., 444; *Holyoke v. Adams*, 59 id., 233; *Medbury v. Swan*, 46 id., 200.) The court below erred in saying that special damages, as set forth in the supplemental bill, and occurring after the service of the original complaint, could be reached by an amended complaint. (*Hornfuger v. Hornfuger*, 6 How., 13; S. C., 1 Code R. [N. S.], 180; *Drought v. Curtiss*, 8 How., 56; *Hendricks v. Decker*, 35 Barb., 298; *Williams v. Herrman*, 16 Abb., 173; *McMahon v. Allen*, 1 Hilt., 103; S. C., 12 How., 39; 3 Abb., 89; *Houghton v. Skinner*, 5 How., 420; *Radley v. Houghtilling*, 4 id., 251; *Sage v. Mosher*, 17 id., 367; *Langdon v. McQueen*, 15 id., 345, and later by G. T. N. Y. Supreme Court, 1st Dept.; *Corbin v. Knapp*, 5 Hun, 197; *Collins v. Lavenberg*, 19 Ala., 682; *Barringer v. Burke*, 21 id., 765; *Graves v. Milcs*, Harr. [Mich.], 332.) The office of the supplemental complaint in this action is in aid of the former pleading simply. (2 Wait's Pr., 471, 469, 472; *Buchanan v. Comstock*, 57 Barb., 582; *Milner v. Milner*, 2 Edw. Ch., 114; New Code, § 544.) The supplemental pleading varied the relief, to which plaintiff was entitled at the commencement of the suit, and was therefore proper. (*Penman v. Sloan*, 41 N. Y., 60; Townshend on Libel, § 348.)

John Townshend, for respondent. Section 544 of the Code of Civil Procedure does not change, but merely declares the practice as established under section 177 of the Code of Procedure, and the granting or refusing leave to file a supplemental pleading is still discretionary. (*Spears v. The Mayor*, 72 N. Y., 444; *Medbury v. Swan*, 46 id., 200.) Notwithstanding section sixty-nine of the Code of Procedure, a distinction is still recognized between actions which demand equitable relief and others. (*Wisner v. Ocompaugh*, 71 N. Y., 117.) In legal actions the right of action must depend upon facts which exist at the commencement of the action. (*Wisner v. Ocompaugh*, 71 N. Y., 113; *Tiffany v. Bowerman*, 2 Hun, 643; *Oathout v. Ballard*, 41 Barb., 33; *Smith v. Holmes*, 19

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N. Y., 271; *Jenkins v. Fahey*, 73 id., 359; *Latham v. Richards*, 15 Hun, 131.) A supplemental bill is allowable when the same end could not be obtained by an amendment of the complaint. (Story's Eq. Pl., § 333; *Sage v. Mosher*, 17 How. Pr., 369.) The facts stated in the supplemental complaint must be material to the matter in controversy (Story's Eq. Pl., § 43), and vary the relief to which the plaintiff was entitled at the commencement of the action. (*Penman v. Sloan*, 41 N. Y., 60.) In an action for libel, the words being libelous *per se*, or concerning the plaintiff in his business, the plaintiff, without any allegation of special damage, can recover all his damages proper for him to recover. This includes damages past, present and future. (*Ingram v. Lawson*, 6 Bing. [N. C.], 212; *Gregory v. Williams*, 1 Fost. & F., 567; *Goslin v. Corry*, 7 Man. & G., 343.) Matter cannot be allowed to be brought before the court by supplemental complaint which gives the plaintiff either a new and subsequent cause of action, or which could be given in evidence in aggravation of damages. (*Root v. Lowndes*, 6 Hill, 518; *Keenholts v. Becker*, 3 Den., 346; *Phil. R. R. Co. v. Quigley*, 21 How. [U. S.], 202; *Burwell v. Adkins*, 2 Scott [N. S.], 11.) The judge erred in granting *ex parte* leave to file the supplemental complaint. (2 Wait's Pr., 470; *Holyoke v. Adams*, 59 N. Y., 233.)

EARL, J. This is an action of libel commenced in June, 1877, and it has been at issue since July of that year. In March, 1879, after the cause had been on the circuit calendar ready for trial several times, the plaintiff obtained, at Special Term of the Supreme Court, an *ex parte* order allowing him to serve a supplemental complaint, alleging the continuance, since the commencement of the action, of special damages caused by the libel. The defendant moved to vacate that order, and the motion was denied. From the order refusing to vacate he appealed to the General Term, and there the order appealed from was reversed and the *ex parte* order allowing the supplemental complaint was

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vacated. The plaintiff has now appealed to this court from the General Term order.

There are two grounds upon which the order of the General Term may be sustained: 1. Notwithstanding the mandatory language used in section 544 of the Code, if this were otherwise a proper case for a supplemental complaint, upon the facts as they appear in this case, its allowance was in the discretion of the Supreme Court. The discretion exercised at Special Term could be reviewed by the General Term, but will not be by this court: (*Spears v. The Mayor, etc.*, 72 N. Y., 442.) 2. A supplemental complaint should not be allowed upon an *ex parte* application. In allowing it, it is the duty of the court to consider all the circumstances, and grant or refuse it as may be just and proper in the particular case. Therefore both parties should be heard, and to that end the application should be upon notice: (*Holvoake v. Adams*, 59 N. Y., 233.)

The order should therefore be affirmed, with costs.

All concur.

Order affirmed.

79 582
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THE PEOPLE ex rel. THE MAYOR OF THE CITY OF NEW YORK, Respondents. v. SIDNEY P. NICHOLS, Impleaded, etc., Appellant.

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The power to remove certain city officers "for cause," and after opportunity to be heard, given to the mayor by the charter of the city of New York of 1873 (§ 25, chap. 335, Laws of 1873), can only be exercised upon just and reasonable grounds, and after notice to the person charged. The proceeding must be instituted upon specific charges, sufficient in their nature to warrant the removal, which, unless admitted, must be proved; the defendant may cross-examine the witnesses to support the charges, call others in his defense, and in all the steps of the proceedings is entitled to be represented by counsel.

The proceeding, therefore, being judicial in its character is subject to review by a writ of certiorari issued by the Supreme Court.

The Supreme Court having, under the State constitution (art. 6, § 6), general jurisdiction of law and equity, its jurisdiction cannot be limited either

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by the Legislature, or by any power conferred by it upon the court itself.

A motion for judgment upon the return to a writ of certiorari in such proceedings presents a question of law only, and comes within the class of non-enumerated motions as defined by Supreme Court rule thirty-eight. But if otherwise it is within the jurisdiction of the court to hear it at any Special Term, and upon such notice as shall be prescribed.

A notice of less than eight days may be prescribed (Code of Civil Procedure, § 780, S. C. rule 37), by order to show cause.

The power to shorten notice is not affected by the rule of the Supreme Court (rule 44), providing that a case on certiorari may be brought to a hearing upon the usual notice of argument; the rule is binding only so far as it is consistent with the Code (§ 17).

It seems, that the exercise of this power is subject to review whenever an order to show cause at Special Term is granted.

It is not improper to bring on the certiorari for a hearing at the Special Term at which the order to show cause is made returnable.

Where a writ of prohibition is issued by the General Term of the Supreme Court, addressed to the Special Term, the inquiry thereon relates simply to the jurisdiction (chap. 70, Laws of 1873); an error or mistake in practice affords no foundation for the writ, unless it involves the doing of something "contrary to the general law of the land."

The Mayor of the City of New York having removed the defendant N. from the office of commissioner of police, a writ of certiorari was, upon his application, duly allowed and made returnable at a Special Term designated "for non-enumerated motions and chamber business," on the first Monday of September, 1879. A return to the writ was filed September fifteenth; on the sixteenth, the justice assigned to hold that term made an order requiring the mayor to show cause at the Special Term, to be held on September twenty-second, why N. should not have judgment on the return, vacating the judgment of the mayor; the order provided that service on September seventeenth, would be sufficient. Whereupon the General Term granted an order directing that a writ of prohibition issue prohibiting the Special Terms appointed to be held in the city of New York for non-enumerated motions and chamber business, and the justices appointed to preside thereat, from proceeding to entertain any motion or application for any judgment or order affecting the proceedings of the Mayor. On appeal from the order, *held*, that there was no violation of the provisions of any statute or unlawful exercise of jurisdiction by the justice holding the Special Term; and that the order appealed from was erroneous.

People ex rel. v. Nichols (18 Hun, 530), reversed.

(Argued January 13, 1880, decided January 27, 1880.)

THE nature of the appeal and the facts appear in the opinion. (Reported below, 18 Hun, 530.)

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John D. Townsend, for appellant. The only office of the writ of prohibition is to prevent an inferior court from acting without jurisdiction. (*Thompson v. Tracy*, 60 N. Y., 31; *Quimbo Appo v. The People*, 20 id., 530.) Jurisdiction cannot be conferred either by consent or waiver. (*Dudley v. Mayhew*, 3 N. Y., 9.) The jurisdiction of the Supreme Court at Special Term depends upon the constitution and laws, and no apportionment of business, although ordinarily respected, will deprive a justice of the Supreme Court of any of his constitutional rights and powers. (Art. 4 of the Constitution, § 6.) The signing of the order to show cause, and the expression of opinion by Justice WESTBROOK upon the powers of Special Terms, was no evidence of an assumption of extra jurisdictional power. (*People ex rel. Smith v. Russell*, 29 How. Pr., 176.) No irregularity was committed in seeking to have a hearing upon the return of the mayor by means of the order to show cause. (Rule 38; id., 44; Code, § 770; *In re Zamchelli*, August 30, 1879; *People v. Chastine Cox*, July 8, 1879; *Ryan v. Police Commissioners*, July 13, 1878; *Howe v. Duffy*, May 18, 1879; 5 Wait's Practice, 457, and cases cited; *People v. Jacobs*, 5 Hun, 428; *People v. Stillwell*, 19 N. Y., 531; *People v. Board of Police*, 39 id., 506; *People v. McDonald*, 69 id., 362.) The writ should not issue where there are other remedies perfectly adequate. (*People v. Supervisors of Ulster Co.*, 31 How. Pr., 237; *People v. Clute*, 42 id., 157.) The Supreme Court has jurisdiction to review, by certiorari, proceedings for the removal by the mayor of New York of heads of departments. (*People ex rel. Bancroft v. Weygant*, 16 Hun, 546; *People v. Board of Police*, 39 N. Y., 506; *People ex rel. Folk v. Board of Police and Excise*, 72 id., 415; *People ex rel. Munday v. Fire Commissioners*, 72 id., 445.) If an officer's action is judicial, it is subject to review by writ of certiorari. (*Leroy v. Mayor*, 20 J. R., 429.) To effect a removal for cause, after opportunity to the accused to be heard, specific charges must be made. (Dillon on Corps., §§ 192, 193; *Murdock*

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v. *Phillips' Academy*, 7 Pick., 303; *Osgood v. Nelson*, L. R. [5 H. of L.], 653; *Commonwealth v. Arnold*, Littell, 327; *Rex v. Liverpool*, 2 Burrows, 734.) A reasonable and just cause must be assigned — one personal to the accused. (39 N. J. L. R., 22; *Osgood v. Nelson*, L. R. [5 H. of L.], 636; *People ex rel. Munday v. Fire Commissioners*, 72 N. Y., 445.) Reasonable notice of the time and place for hearing upon the charges must be given to the accused. (*Murdock v. Phillips' Academy*, 12 Pick., 244, 263, 266; Wilcox on Corps., par. 700.) The existence of the assigned cause must be ascertained by the production of proofs. (*Page, Second Auditor v. Hardin*, 8 B. Munroe [L. & Eq. R.], 649, 672, 674, 675.) The above constitutes the indicia of a "judicial" proceeding. (Code, §§ 843, 851, 854, 856.) A review of the mayor's action by certiorari is the only proper remedy. (*People v. Fairchild*, 67 N. Y., 334; *People v. Stout*, 19 How. Pr. R., 171; *Wood v. Peake*, 8 J. R., 69; *Wildy v. Washburn*, 16 id., 49; *People v. Van Slyck*, 4 Cow., 297, 323; *People v. Stout*, 19 How. Pr. R., 171; *People v. Bearfield*, 35 Barb., 254.)

Francis N. Bangs, for respondent. A writ of certiorari never issues for the purpose of bringing up for review interlocutory, or intermediate, or preliminary proceedings. (*Lynde v. Noble*, 20 J. R., 80; *Haines v. Backus*, 4 Wend., 213; *Stone v. The Mayor*, 25 id., 168; *People v. Pilot Board*, 37 Barb., 126; *People v. Supervisors*, 43 id., 232; *People v. Comrs.*, 30 N. Y., 72; *Cuyler v. Trustees*, 5 T. & C., 609.) Upon the presumption that the governor would, and could, correct errors, no judgment of the Supreme Court could be effectual. (*People v. Walter*, 68 N. Y., 409; Dwin. & East, 196 n.) Upon the theory that a proceeding for the removal of a police commissioner is a judicial proceeding, then it is so at every stage and in all its parts. (*Matter of Eightieth street*, 17 Abb., 264.) Until the court heard from the governor it had nothing of which it had jurisdiction to take notice. Ho

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was the custodian of the record. (*Bogert v. The Mayor*, 7 Cow., 158; *People v. Van Allen*, 55 N. Y., 31; *People v. Brooklyn*, 9 Barb., 535; *People v. Reddy*, 43 id., 545; *People v. Comrs.*, 43 id., 494; *People v. Fredericks*, 48 id., 173; *People v. Comrs.*, 9 Hun, 609; *People v. Assessors*, 16 id., 407; *Marsh v. Delaney*, 49 N. Y., 655; *People v. R. R. Co.*, 55 id., 602.) When the case reached the governor's hands it was *res nova*. (*Murdock v. Phillips' Academy*, 7 Pick., 303.) The fact that the process of removing a police commissioner consists of successive steps is no ground for reviewing them in detachments. (*People v. Hill*, 65 Barb., 171; *People v. Walton*, 68 N. Y., 407.) The court, by taking separate cognizance of the proceedings before the mayor, upon his hearsay and second-hand report of them cannot, by vacating or reversing them, reach, nullify and reverse the action of the governor. (*People v. Brady*, 56 N. Y., 182; *Murdock v. Phillips' Academy*, 7 Pick., 363.) There is no precedent for the exercise of the power, which was exercised by the court below in its original order. (*Sutherland v. The Governor*, 29 Mich., 320; *Mauran v. Smith*, 8 R. I., 192; *Dennett's Petition*, 32 Me., 210; *People v. Bissell*, 19 Ill., 229; *State v. The Governor*, 1 Dutch., 332; *Hawkins v. The Governor*, 1 Ark., 578; *Norton v. Dowling*, 46 How. Pr., 7; *Burch v. Hardwick*, 23 Gratt., 51; *Grier v. Taylor*, 4 McCord, 206; *People v. Stout*, 11 Abb. Pr., 17; *People v. Bearfield*, 35 Barb., 254; *People v. Burnside*, 3 Laus., 74; *Keenan v. Perry*, 24 Texas, 253; *State v. McGarry*, 21 Wis., 496; *Hoboken v. Gear*, 3 Dutch., 268; *State v. Doherty*, 25 La. Ann., 119; *Ex parte Vallandingham*, 1 Wall., 253; *Ex parte Metzger*, 5 How., 348; *U. S. v. Ferreira*, 13 id., 48.) No judicial power is, in terms, vested in the mayor by the charter in removing heads of departments. (Laws of 1873, chap. 335, §§ 19, 489; 3 Bl., 24; *In re Metzger*, 5 How., 176; *U. S. v. Ferreira*, 13 id., 40; *Ex parte Vallandingham*, 1 Wall., 253; *Ex parte Mayor of Albany*, 23 Wend., 288; *People v. Walter*, 68 N. Y., 410; *People v. Mayor of N. Y.*, 2 Hill, 9; S. C., id., 14 n. a; *People v. Van Slyck*,

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4 Cow., 297; *People v. Board of Health*, 33 Barb., 344; *Briggs v. McKellar*, 2 Abb. Pr. R., 42; *Martin v. Mott*, 12 Wheat., 31.) The second order made by Judge WESTBROOK, i. e., the one made on September fifteenth, was unauthorized by law. (*Ex parte Mayor, etc.*, 23 Wend., 289; *People v. Supervisors*, 15 id., 211; *People v. Comrs.*, 30 N. Y., 72; 2 Crary, 357; form 94, p. 393; form 159, p. 660, form 603.) The error committed was not, in a matter, within the court's jurisdiction, but it consisted in going outside of that jurisdiction. (*People v. Liscomb*, 60 N. Y., 559.) If any jurisdiction is vested in the Supreme Court to examine, on certiorari, the manner in which the mayor used his executive and ministerial power, that jurisdiction cannot be exercised by a justice of the court, sitting at chambers, and there holding a Special Term for non-enumerated motions and chambers business. (*People v. Fire Comrs.*, 72 N. Y., 450; Rules 38, 40, 44; *Loan Asso. v. Stevens*, 8 Hun, 515; Code, §§ 232, 235.) The papers made an appropriate case for the issue of a writ of prohibition under chapter 70 of the Laws of 1873. (*Quimbo Appo v. The People*, 20 N. Y., 541.) The writs of "Mandamus and Prohibition," published in 1872, by Charles Crary, Esq.

DANFORTH, J. This is an appeal from an order of the General Term of the Supreme Court, in the first judicial department, directing that a writ of prohibition should be issued to prohibit the Special Terms of the Supreme Court appointed to be held in the city of New York for non-enumerated motions and chamber business, and the justices presiding thereat from proceeding to entertain any application for any judgment or order in any manner affecting the proceedings of the mayor of the city of New York in the removal of Sidney P. Nichols from the office of commissioner of police in pursuance of a writ of certiorari theretofore issued out of the Supreme Court to said mayor, and the return thereto, or either of them, and to prohibit the said Nichols from applying to any such Special Term for any judg-

ment or order upon said writ. The order implies that the proceedings of the mayor in the matter referred to were subject to review in some one of the divisions of the Supreme Court, and that the writ of certiorari furnished the proper means to bring those proceedings before it. It, therefore, seems that the defendant had mistaken neither his remedy nor his forum, but erred only in respect to the time and place of his application for relief: but, upon this appeal, the respondent contends that the court had no jurisdiction to issue the writ of certiorari, and therefore that question is first to be considered.

The record shows that in May, 1876, the defendant, Nichols, was appointed commissioner of police. He accepted the appointment and entered upon the duties of the office. Its term was six years, and the annual salary \$6,000. It was thus an office of honor and profit, to the enjoyment of which he was entitled for the full term, unless removed for misbehavior or unfitness to discharge its duties. The relator was the mayor of the city, and its charter conferred upon him power to remove the defendant, but only "for cause and after opportunity to be heard." (Session Laws of 1873, chap. 335, § 25.) The power is not an arbitrary one, to be exercised at pleasure, but only upon just and reasonable grounds, and then not until after notice to the person charged, for in no other way could he have "an opportunity to be heard." The proceeding, therefore, must be instituted upon specific charges, sufficient in their nature to warrant the removal, and then, unless admitted, be proven to be true. Defendant might also cross-examine the witnesses produced to support the charges, call others in his defense, and in these and other steps in the proceeding be represented by counsel. In no other way could the person sought to be removed have a due hearing or "an opportunity to be heard," and this condition must be complied with before the power of removal is exercised. (*Reg. v. Smith*, 5 Q. B., 614; *Osgood v. Nelson*, 5 House of Lords, 636; *People ex rel. Munday v. Bd. Fire Com'rs*, *infra*.) It follows, therefore, that the proceeding is

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judicial in its character, and, as a necessary consequence, is subject to review by a writ of certiorari issued by the Supreme Court in the exercise of its superintending power over inferior tribunals and persons exercising judicial functions. (*Leroy v. The Mayor*, 20 J. R., 429 ; *People v. Board of Police*, 39 N. Y., 506 ; *People ex rel. Folk v. Board of Police of the City of Brooklyn*, 69 id., 468 ; *People ex rel. Clapp v. Board of Police of the City of New York*, 72 id., 415 ; *People ex rel. Munday v. Board of Fire Commissioners of the City of New York*, 72 id., 445.)

Various other questions have been argued with great ability by the learned counsel for the respondent relating to the form of the writ of certiorari and the effect of the order made by the mayor, whether it is interlocutory or final, but these need not be considered. They relate to the procedure under the writ and must be disposed of when that writ and the return thereto come before the court. They have no relation to the order before us ; that, as its language shows, is quite narrow. The writ granted by it is to prohibit not all the Special Terms of the Supreme Court, but only particular Special Terms of that court, from entertaining further proceedings under the writ of certiorari, and the opinion of the learned court places the order upon distinct grounds, viz : First, that a Special Term for non-enumerated motions and chamber business has no jurisdiction to hear and decide the certiorari proceeding ; and, second, that such proceedings could only be brought on for hearing upon a notice of not less than eight days, and declares that the relator therein at other Special Terms and upon such notice may bring them to a determination. It is therefore true, as the learned counsel for the respondent urges, that the exact "grievance of the appellant is, not that he is wholly prevented from prosecuting the writ of certiorari and the proceedings under it, but it is that in prosecuting it he is restricted to particular branches of the Supreme Court."

Can this distinction be maintained ? It is provided by the constitution that the court itself shall have general jurisdic-

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tion in law and equity. It follows that its jurisdiction can be limited neither by the Legislature nor by any power conferred by it upon the court itself. (*Hart v. Hatch*, 3 Hun, 375.) Its functions are to be exercised by its judges, sitting in General Terms, or at the Circuit, or Oyer and Terminer, or Special Terms. The constitution also provides that each judge may hold Special Terms in any county (art. 6, § 7), and neither in that instrument nor in any statute do we find that one Special Term or one judge at Special Term has or can have more authority or power than another. The Code (§ 232) authorizes the justices of the Supreme Court for each judicial department to appoint the times and places for holding the Special Terms. This authority was exercised in the first district. Some of the terms thus appointed are designated by the justices as "Special Terms for equity cases and enumerated motions," and others as "Special Terms for non-enumerated motions and chamber business," and, while it cannot be doubted that for the due and orderly conduct of litigation and causes, certain steps and proceedings therein may, under the direction of the judges, be required to be taken at specified terms, yet any such regulation must be subject to the control of the justice who is assigned to hold them. If otherwise the power of the judge would be limited, public interests sometimes put in jeopardy and the rights of citizens infringed. The case before us illustrates this position.

The writ of certiorari was, on the application of the relator Nichols, duly allowed in August, 1879, and made returnable at a Special Term of the Supreme Court, at the courthouse in the city of New York, on the first Monday in September then next. This was one of the terms regularly appointed, but was among those designated "for non-enumerated motions and chamber business." After some delays a return was made to the writ, and filed on the fifteenth of September. On the sixteenth day of that month Mr. Justice WESTBROOK, who was duly assigned to hold that term, made an order requiring the mayor to show cause, at the

Special Term to be held in the court-house in the city of New York, on the twenty-second day of September, why Nichols, the relator, should not have judgment on the return vacating the judgment of the mayor removing the relator from his position as commissioner of police, etc., and directed, for reasons shown to him, that service on the seventeenth of September should be sufficient. The case was one of general importance, and the public as well as the relator had an interest in its speedy disposition. At this point, however, upon the application of the mayor, the order appealed from was made. The power of the General Term to grant a writ of prohibition addressed to the Special Term was given by statute (chap. 70, Laws of 1873), to be exercised in the same manner and with the same effects in all respects as the like proceedings when the writ is directed to inferior courts and the judges thereof. In such cases the inquiry relates to "jurisdiction simply." An error or mistake in practice affords no foundation for the writ, unless, as is said in *Ex parte Smith* (3 A & E., 719), it involves the doing of something "which is contrary to the general laws of the land." (*Acherly v. Parkinson*, 3 M. & S., 427; *In re Crawford*, 13 Q. B., 613.) It was decided in these cases that the Court of Queen's Bench would not interfere with the procedure of other courts. In *Thompson v. Tracey* (60 N. Y., 31), the court says: "No question but jurisdiction can be tried in a proceeding inaugurated by a prohibition."

It is also well settled that where a remedy by appeal, or otherwise, may be had to correct an error of law or practice the writ will not lie. (2 Hill, 263, 267.) In such a case the inferior court, or the tribunal of limited jurisdiction, can be set right by appeal only. Where, however, the statute has imposed restrictions as to the circumstances under which such "inferior court or judge thereof" may act in matters otherwise within its jurisdiction, and these restrictions are disregarded, the party aggrieved may have a remedy by prohibition. This is the doctrine stated in *Quimbo Appo v. The People* (20 N. Y., 531), and by Jacobs in the citation

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there made. It goes no further. The remedy may be had to prevent the violation of some fundamental principle of justice, or the transgression of the "bounds prescribed by law." No other power is given to the General Term by the statute cited. In other cases its acts as a court of review and its function in these two capacities ought not to be confounded.

The inquiry, then, is whether the justice who was holding the Special Term had mistaken the practice in a vital particular, or was doing anything manifestly outside of or beyond the jurisdiction of the court.

First. There is no absolute right to a notice of eight days. A notice of less than eight days may be prescribed by a judge or court. This power is conferred by statute (Code, § 780), and recognized by a general rule of the Supreme Court (rule 37); but its exercise is subject to review. (71 N. Y., 434).

Second. It was not improper to bring on the certiorari for a hearing at the Special Term at which the order to show cause was made returnable. It would be had upon the return, and, like a motion for judgment on the pleadings on the ground that an answer raises no issue of fact, would present a question of law only, and thus come within the class of non-enumerated motions (*People v. Northern R. R. Co.*, 42 N. Y., 217), as defined by rule thirty-eight. It is not to be found among those styled in that rule "enumerated motions;" but if it were otherwise it would still have been within the jurisdiction of the court to hear it at any Special Term, and upon such notice as should be prescribed. There is nothing in Supreme Court rule forty-four to prevent it. By that rule it is provided that a case on a certiorari may be brought to a hearing upon the usual notice of argument at the Special Term. It is claimed that this rule has the force of a statute, and that the notice of the argument must, therefore, be of eight days. But the rule is binding only as it is consistent with the Code (§ 17), and, as we have seen, the power to shorten notice is conferred by that statute.

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There was, then, no violation of the provisions of any statute or unlawful exercise of jurisdiction by the justice holding the Special Term named in the order, nor would he have transgressed by entertaining further proceedings pursuant to the order to show cause.

I can discover no ground upon which the order appealed from can stand, and think it should be reversed.

All concur.

Order reversed.

WILLIAM RYAN, Plaintiff in Error, v. THE PEOPLE OF THE
STATE OF NEW YORK, Defendant in Error.

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The provision of the act of 1879, extending the jurisdiction of Courts of Special Sessions (chap. 390, Laws of 1879), which gives to said courts exclusive jurisdiction, in the first instance, to hear and determine, among other things, "charges for assault and battery, not alleged to have been committed riotously," did not oust Courts of Sessions of jurisdiction to try pending indictments for that offence; it applies only to charges made subsequent to the passage of the act.

It seems, that the word "charges" implies an original complaint, made in the first instance, preliminary to a formal trial for a crime, it does not include indictments.

Upon the trial of an indictment for assault and battery, the offence was alleged to have been committed during an affray at a town meeting; one of the witnesses for the prisoner was asked on cross-examination whether he had been indicted, for assault and battery, committed on that day, this was objected to, objection overruled, and the witness answered "yes," *held*, that it was a fair inference that the witness was indicted as one of the participants in the affray; and that the question was competent to show the position he occupied, in respect to the controversy, out of which the affray arose, and his interest in the litigation, and as showing prejudice or bias.

It seems, that the mere fact that a witness has been indicted, cannot legitimately tend to discredit him or impeach his moral character, and that evidence thereof is therefore incompetent; (FOLGER and EARL, J.J., dissenting, and holding that the allowance of questions on cross-examination of a witness, as to his having been indicted, are in the discretion of the court).

One of the witnesses for the prosecution, when asked what he saw of the occurrence, answered among other things, "I should judge he (the com-

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plainant) struck a stone," this was on motion struck out, *held*, no error, as it was not responsive to the question, and was a conjecture, not knowledge.

Also *held*, that evidence that the prisoner made an effort to keep out of the way of the sheriff was competent.

It seems, however, that such evidence is very slight, if any evidence of guilt.

(Argued January 14, 1880; decided January 27, 1880.)

ERROR to the General Term of the Supreme Court, in the third judicial department, to review judgment affirming a judgment of the Court of Sessions, in and for the county of Ulster, entered upon a verdict, convicting the plaintiff in error, of the crime of assault and battery.

The facts are sufficiently stated in the opinion.

F. L. Westbrook, for plaintiff in error. The Court of Sessions had no jurisdiction to try the case. (Const. art. 6, § 14; 3 R. S. [6th ed.], 234.) Its jurisdiction was taken away by chapter 390, Laws of 1879, and that act annulled all proceedings commenced under the former statute, but not then decided. (*People v. Rawson*, 61 Barb., 619, 635; *Commonwealth v. Kimball*, 21 Pick., 376; *People v. Bull*, 46 N. Y., 68; *Delamater v. People*, 5 Laus., 334; *Johnson v. R. R. Co.*, 49 N. Y., 462; *Newel v. People*, 3 Seld., 97; *Benton v. Wickwire*, 54 N. Y., 258; *Butler v. Palmer*, 1 Hill, 324, 330; *Curtis v. Leavit*, 15 N. Y., 229; *Harting v. People*, 22 id., 95, 102; *Town v. Jenkins*, 57 id., 192.) The question put to Luke R. Ford, one of the witnesses for the defense, if he had been indicted for assault and battery, was improperly allowed. (*People v. Genung*, 11 Wend., 18, 21; *People v. Gray*, 3 Seld., 378; *Jackson v. Osborn*, 2 Wend., 555; *Crapo v. People*, 15 Hun, 269.) Evidence having been improperly admitted, and the prisoner having been convicted, the error in the admission of evidence is presumed to have prejudiced him, and the judgment must be reversed, unless it clearly appears that the improper evidence could not possibly have had effect. (*Coleman v. People*, 58 N. Y., 562.) When an erroneous charge is made, the ver-

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dict must be set aside, unless it clearly appears it did not, and could not, have affected the verdict. (*Greene v. White*, 37 N. Y., 405; *People v. Bennet*, 49 id., 148; *People v. Case* [not published].)

A. T. Clearwater, for defendant in error. The provisions of chapter 390 of the Laws of 1879 did not affect the jurisdiction of the Court of Sessions to try the indictment at bar. (1 Blackstone's Com., 87, 90; *Smith v. The People*, 47 N. Y., 330; 2 Cow., 419; *People v. Lambier*, 5 Den., 9; 3 R. S. [6th ed.], 1004, § 1; 4 Blackstone's Com., 302; *Gardner et al. v. The People*, 62 N. Y., 299, 306, 307; *Donaldson v. Wood*, 22 W. R., 395; Bacon's "Ab Statutes," 5; *People v. Supervisors of Columbia Co.*, 43 N. Y., 130, 132; *People ex rel. Witherbee v. Supervisors*, 70 id., 228, 236.) A law is never to have retroactive effect unless its express letter or clearly manifested intention requires that it should have such effect. (*Dash v. Van Kleeck*, 7 J. R., 499; *Berley v. Rampacher*, 5 Duer, 183; *Sayre v. Wisner*, 8 Wend., 662; *Palmer v. Conly*, 4 Denio, 376; *Calkins v. Calkins*, 3 Barb., 305; *Jackson v. Van Zandt*, 12 J. R., 168; *People v. Supervisors of Columbia Co.*, 10 Wend., 363; *Hackley v. Sprague*, id., 114; *N. Y. and Oswego M. R. R. Co. v. Van Horn*, 57 N. Y., 473; Earl, 477, 478; *Monegan v. The People*, 55 N. Y., 613, 616; *Benton v. Wickwire*, 54 id., 226, 229; *Berley v. Rampacher*, 5 Duer, 183; 2 Dwar., 677; *Palmer v. Conly*, 4 Den., 374; 2 N. Y. [2 Comst.], 182; *Jarves v. Jarves*, 3 Edw. Ch., 462; 7 J. R., 477; *Wood v. Oakley*, 11 Paige, 400; 4 Edw., 562; *People v. Supervisors of Columbia*, 10 Wend., 363; *Van Rennselaer v. Livingston*, 12 id., 490; Pr. Lib., 42, 78; 2 Inst., 292; 6 Bac. Abr., 370; 2 Mod., 310; 2 Lev., 227; 2 Jones, 108; 4 Burr., 2460; 1 Bay., 179; 3 Dall., 386; 2 Cranch, 272; 1 Bl. Com., 44; 2 Ld. Raym., 1352; *Dash v. Van Kleeck*, 7 J. R., 477; *Sayre v. Wisner*, 8 Wend., 661; *Bates v. Stearns*, 23 id., 482; *S. P. Bolles v. Duff*, 7 Abb. Pr. [N. S.], 385; S. C., 55 Barb., 580; 38 How. Pr.,

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492, 504; *Birch v. Newbury*, 10 N. Y., 374, 390; *James v. Patton*, 6 N. Y., 9; *People v. Caranal*, 6 id., 463; *Ely et al. v. Holton*, 15 id., 595; *Tonnelle v. Hall*, 4 id., 140, 144; *Evergreens*, 47 id.; 1 Kent's Com., 510; 15 Wend., 241; 7 J. R., 477; 1 Kent's Com., 462; *New York and Brooklyn Bridge*, 72 N. Y., 527; *Holmes v. Carley*, 31 id., 289; 32 Barb., 440; *Chase v. N. Y. Central R. R. Co.*, 26 N. Y., 523; *Donaldson v. Wood*, 22 Wend., 395; Dwar. on Stat., 562; *Pillow v. Bushnell*, 5 Barb., 156; 1 Kent's Com., 463; Smith on Stat., §§ 701, 703; *White v. Wager*, 32 Barb., 250; affirmed in 25 N. Y., 328; Dwar., 562, 614, 632; *Younge & J.*, 196; Bishop on Stat. Crimes, § 154; *Furman v. Nichol*, 3 Cald., 432; *Commissioners of Central Park*, 50 N. Y., 493; Bishop on Stat. Crimes, § 165.) Repeals by implication are not favored by the law. (Bishop on Stat. Crimes, § 154; *In the Matter of the Commissioners of Central Park*, 50 N. Y., 493; *The People ex rel. Kingsland v. Palmer*, 52 id., 83; *Loher v. Brookline*, 13 Pick., 343, 348; *Haynes v. Jenks*, 2 id., 172, 176; *Snell v. Bridgewater Cotton Gin Manuf. Co.*, 24 id., 407; *Goddard v. Boston*, 20 id., 407; *Bowen v. Lease*, 5 Hill, 22; *Wyman v. Campbell*, 6 Port., 219; *Dugan v. Gittings*, 3 Gill, 138; *McCartee v. Orphan Asylum Society*, 9 Cow., 437; *Lichtenstein v. The State*, 5 Ind., 162; *Erwine v. Moore*, 15 Ga., 361; *Aspden's Estate v. Wallace, jr.*, 368, 431; *Hockaday v. Wilson*, 1 Head., 113; *Robbins v. The State*, 8 Ohio, 131; *The State v. Morrow*, 26 Mo., 131; *Swann v. Buck*, 40 Miss., 268; *People v. San Francisco, etc., Railroad*, 28 Cal., 254; *Blain v. Bailey*, 25 Ind., 165; *Buckingham v. Steubenville and Indian Railroad*, 10 Ohio, 25; *Commonwealth v. Flannelly*, 15 Gray, 195; *Goddard v. The City of Boston*, 20 Pick., 407, 410; Bishop on Statutory Crimes, § 155; *N. Y. and Oswego M. R. R. Co. v. Van Horn*, 57 56 N. Y., 473; *Smith v. The People*, 47 id., 330; *In the Matter of the Evergreens*, 47 id., 216; *The People v. Carnal*, 6 id., 463; *Ely et al. v. Fulton*, 15 id., 595; *The People v. Lord*, 12 Hun, 285; *Blain v. Bailey*, 26

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Ind., 165; *The State v. Bishop*, 41 Mo., 16; *Johnson v. Burrell*, 2 Hill, 238; Kent's Com., 463; *Church v. Crocker*, 3 Mass., 21; *Mendon v. Worcester County*, 10 Pick., 235; *United Society v. Eagle Bank*, 7 Conn., 456; Bacon's Abdg't Stat., J., 3; *McMillan v. Adams*, 1 Marq. [H. L. Cas.], 120; *Rogers v. Bradshaw*, 20 J. R., 735; *McCarter v. Orphan Asylum*, 9 Cow., 437.) If the court should have any doubt upon the question of jurisdiction, the people should have the benefit of the doubt. (*Smith v. The People*, 47 N. Y., 330; *Tremain v. Richardson*, 68 id., 617; *State of Kansas v. Crawford*, 11 Kansas, 32; *Trist v. De Cabezas*, 2 Robt., 708; *Sayre v. Wisner*, 8 Wend., 661; 7 J. R., 477; 1 Hill, 324; 2 Seld., 463; 11 Paige, 400; 15 N. Y., 595; *Sanford v. Bennet*, 24 id., 20; *Hartung v. The People*, 22 id., 95.) The court committed no error in overruling the objection made by the prisoner to the questions put to the witnesses Ford and Butler. (Greenleaf on Evidence, § 459; *Parkhurst v. Lawton*, 2 Swanst., 216; Roscoe's Crim. Ev. [4th Am. ed., from 3d London ed.], 180; *Maine v. The People*, 9 Hun, 113, 118; *Brandon v. The People*, 42 N. Y., 265; *Great Western Turnpike v. Loomis*, 32 id., 127; *La Beau v. The People*, 34 id., 223; *Vaughan v. Westover*, 2 Hun, 43; *Southworth v. Bennett*, 58 N. Y., 659; *People v. Stokes*, 53 id., 164; *Brandon v. The People*, 42 id., 265; *Connors v. The People*, 50 id., 240; see also *Fralich v. The People*, 65 Barb., 48; *White v. McLean*, 57 N. Y., 670; *La Beau v. The People*, 34 id., 233; *Turnpike Co. v. Loomis*, 32 id., 127; *Fry v. Bennett*, 3 Bos., 200; *Terry v. McNeal*, 58 Barb., 241; *Shepard v. Parker*, 30 N. Y., 517; *Allen v. Bodine*, 6 Barb., 383; *Russell v. The St. Nicholas Fire-Ins. Co.*, 51 N. Y., 543; *Real v. The People*, 42 id., 270; *Rex v. Pitcher*, 1 Car. & P., 75; *Real v. The People*, 42 N. Y., 270; *The People v. Casey*, 72 id., 393.)

CHURCH, Ch. J. The most material point presented is whether the Court of Sessions of Ulster county, had power and jurisdiction to try the indictment in this case.

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The indictment was for assault and battery, and was found at the Oyer and Terminer in April, 1879, and by order of that court sent to the Sessions. At a term of the latter court in June, 1879, the defendant was brought to trial, and the jurisdiction of the court properly challenged, and the objection overruled. The jurisdiction is claimed to have been taken away by an act of the Legislature, passed May 28, 1879, which provides that "courts of Special Sessions * * * shall in addition to the power now possessed by them, have also exclusive jurisdiction in the first instance, to hear and determine the following cases : "

The act specifies "charges" for several offences, and among them specifies "charges for assault and battery not alleged to have been committed riotously."

We are of opinion that this act did not take away the jurisdiction of the Sessions to hear and try this case. Neither the language nor intent necessarily lead to that conclusion. The word "charges" implies an original complaint made in the first instance preliminary to a formal trial for a crime. This case was not in a condition where such a charge could be made. An indictment had been regularly found at Oyer and Terminer, which had been sent to the Sessions for trial, and the latter court had jurisdiction of the case for that purpose, when the act was passed. Special Sessions cannot try cases upon indictment, and although an indictment is in an enlarged sense, a charge, yet it would not be included in that term as used in ordinary legal language, or in this act. Nor can an intention be imputed to the Legislature to oust the court of Sessions of jurisdiction to try pending indictments, and the language goes far to show that it was intended to apply only to cases so situated that charges could thereafter be made, in the ordinary way by preliminary complaint. This is the most obvious meaning of the language, and accords with what may be supposed to have been the intention of the Legislature. Assuming as claimed that the intent was to require all the cases of crime specified to be tried at Special Sessions with a view to economy, it must be limited to such

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as could at the passage of the act be *charged* as contemplated by the statute, or in other words it applied to charges subsequently made. The further contention is made that it does not affect the jurisdiction of the grand jury in any case from finding an indictment, nor the Oyer and Terminer or Sessions from trying it as before, but applies only to cases where preliminary complaints are actually preferred before committing magistrates. The language does not in express terms deprive the courts named of jurisdiction, and it is argued that the language employed may be satisfied by holding that exclusive power to try certain offenses applies to those only where charges or preliminary complaints, are in fact made, and the case of *Gardiner v. The People* (62 N. Y., 299), is cited to sustain this construction. The statute conferring power upon the court of General Sessions in New York, is more comprehensive than the statute conferring power upon courts of Sessions, and the statute relied upon in that case to oust the General Sessions of jurisdiction was somewhat more restricted and qualified than the statute relied upon in this case, and we deem it unnecessary to decide whether this case falls within the principle of that decision or not. It is sufficient to hold that this statute does not apply to the trial of indictments pending at the time the act was passed.

Two of the witnesses for the defendant were asked whether they had been indicted. The questions were objected to as incompetent and immaterial, and as not tending to impair their credibility or affect their moral character. The court overruled the objections, and exceptions were duly taken. This court in the recent case of *The People v. Crapo*,* while recognizing the legal right, subject to the discretion of the trial judge, to put questions to a witness as to specific facts which tend to discredit the witness, or impeach his moral character, held that the mere fact that a witness had been indicted, could not legitimately have that effect, and was therefore incompetent. The rule was applied in that case to an accused person who was sworn as a witness in his own

* 76 N. Y., 288.

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behalf, but on principle it seems equally incompetent when applied to any other witness. An indicted person is presumed innocent, and yet the fact of an indictment is sought to impeach him as a witness. I do not think it is a legitimate fact for that purpose. A witness may be asked in the discretion of the court as to transactions which affect his character either for truth or veracity, or his moral character, but not such as do not have that effect. It is however unnecessary to pass definitely upon this question in this case, as we are of the opinion that the questions were competent to show the position which those witnesses occupied in respect to the controversy out of which the affray arose.

Mr. Greenleaf says: "the situation of the witness with respect to the parties, and to the subject of litigation, his intent, his motives, his inclination and prejudices * * * are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he had testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight, and value of his testimony."

As to the witness Ford the question was specific whether he had been indicted for an assault and battery committed on the same day. From this it is fairly inferable that he was indicted as one of the participants in the affray at the town meeting at which the assault was made upon the prosecutor. He might therefore have an interest in the litigation, and a feeling of prejudice or bias which was proper for the consideration of the jury in weighing his evidence. As to the witness Butler it does not clearly appear that the indictments against him were for acts committed on that day, although it might be inferred that one of them was. As to the other indictment no exception was taken. We are of opinion that as to one indictment the inference that it was connected with the town meeting, may be indulged, and hence that he was so connected with the controversy at the town meeting as to make it proper to show his feeling and bias in respect to the affray, and that for this reason the evi-

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dence was competent. It is sufficient if the evidence is competent for any purpose.

The evidence of the defendant's witness Hollahan, stating that "I should judge he (the complainant) struck a stone," was not responsive to the question, which simply asked for what the witness saw of the occurrence in question, and seemed to be a conjecture, instead of knowledge, and there was no error in striking it out.

The evidence that the defendant made an effort to keep out of the way of the sheriff, was very slight, if any evidence of guilt. There are so many reasons for such conduct, consistent with innocence that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances. It was not error to admit it. I have examined the charge carefully, and do not think that any of the exceptions to it present a legal error.

There was a serious conflict in the evidence whether the defendant committed the assault which produced the injury, but it was the exclusive province of the jury to determine that question, and with their decision we have no power to interfere.

The judgment should be affirmed.

All concur.

FOLGER and EARL, JJ., concurred in the result only; thinking that in the law of evidence of this State, it had been settled that the trial court may, in its discretion, allow the questions put to Ford and Butler on cross-examination and discussed by the chief judge in his opinion. See *Southworth v. Bennett* (58 N. Y., 659), where it was said by JOHNSON, J., in an opinion (in MSS.) concurred in *per totam curiam*: "The question put by the defendant's counsel to the plaintiff, whether he was not then under indictment for usury, seems to have been one of those depreciatory questions which, although not relevant to the issue, a judge may, in his discretion, allow to be put on cross-examination.

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After considerable discussion in this State, the constant practice at Circuit and the decisions in *Brandon v. People* (42 N. Y., 265); *People v. Gay* (7 id., 378), and *Lipe v. Eisenlord* (32 id., 229), seem to leave no doubt that the allowance of such questions rests in the discretion of the court."

Judgment affirmed.

HENRIETTA B. POWER, Individually and as Executrix, etc., Appellant, v. HUGH CASSIDY as Surviving Executor, etc., et al., Respondents; PETER RICE, Appellant.

The will of P. gave all of his estate, real and personal, to his executors in trust, with power to sell, and out of the proceeds of sale, or of the income, to pay to the wife of the testator a specified annuity during life, the same to be "in lieu of all dower or thirds" in his estate; his residuary estate he gave, one-third to his wife, one-third to R., the balance he gave to his executors, "to be divided by them among such Roman Catholic charities, institutions, schools or churches in the city of New York" as the majority of his executors should decide, and in such proportions as they should think proper. At the time of the testator's death there were, in said city, many incorporated Roman Catholic charities, institutions, schools and churches capable of taking by devise or bequest; and a majority of the executors designated certain of said organizations as the beneficiaries. In an action to obtain a construction of the will, *held*, that as there were organizations of the class specified capable of taking, and which could be ascertained, the provision, as to them was not void for uncertainty; that the fact that power was conferred upon the executors to designate the beneficiaries, and the share of each, did not impair or affect the legality of the provision; that the executors were limited to such organizations as were capable of taking; also that by the terms of the will there was an equitable conversion of the testator's real estate into personalty.

Norris v. Thompson's Ex'rs (19 N. J., 307); *Stubbs v. Sargon* (3 M. & C., 507; 2 Keen, 255); *Morice v. Bishop of D.* (10 Ves., 522); *Ommanny v. Butcher* (1 T. & R., 260), distinguished.

It seems, that, had there been a failure to make the selection, the court would have power to decree the execution of the trust.

Also, *held*, that the widow of the testator was entitled to one-third of the whole residuary estate, including one-third of the sum set apart and invested to produce the annuity; that the provision, giving to her a third, was not inconsistent with the provision providing for an annuity, but was a gift in addition to it.

79	602
108	819
108	821
108	828
79	602
115	104
79	602
125	591
79	602
127	532
79	602
130	81
79	602
136	134
79	602
147	111
79	602
160	497

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Where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended a sale, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative.

Orders were made directing the various corporations designated by the executors as the beneficiaries under the will to be brought in as parties defendants. *Held*, no error, that they were interested in the controversy, and were properly made parties under section 122* of the Code of Procedure.

(Argued January 16, 1880 ; decided January 27, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, affirming a judgment, entered upon a decision of the court, on trial at Special Term. (Reported below, 16 Hun, 294.)

This action was brought to obtain a judicial construction of the will of John H. Power, late of the city of New York, deceased, and to determine the validity of certain clauses of the will.

The clauses of the will in question are as follows :

“ After my lawful debts are paid, I give and bequeath all my property, both real and personal, unto my executrix and executors hereinafter named, that is to say : to my beloved wife, Henrietta B. Power, and to my friends, Lewis J. White and Cassidy, of the city of New York, all of whom I have named as executrix and executors of this my last will and testament, to have and to hold the same and every part thereof unto the said parties, their heirs and assigns forever, upon the trusts, nevertheless, that they are to collect the money due on the bonds and mortgages due to me, and also the rents of my property, and sell and dispose of my stocks ; and out of the proceeds of the sale of my property, or of the income thereof, I direct my executrix and executors to pay to my beloved wife Henrietta, the sum of eight thousand dollars per year, in half-yearly installments of four thousand dollars, the first installment to be due and payable in one month after my decease ; the said sum of eight thousand dollars per year to be paid to my said wife during the term

* See section 452 Code of Civil Procedure.

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of her natural life, and to be in lieu of all dower or thirds in my estate, either real or personal.

“I hereby appoint my wife, Henrietta, Lewis J. White and Hugh Cassidy, of the city of New York, executrix and executors of this my last will and testament, with full power to them, or to the survivors of them, to sell all my real and personal estate at such times as they may deem proper, with the exception of the house and lease of lot on Fifth avenue, between Fiftieth and Fifty-first streets, which I wish sold as soon as possible, and with power to them to go on and finish the same, and take the expense of finishing out of my estate. All the rest, residue and remainder of my estate, both real and personal, I give and devise one-third thereof to my beloved wife, Henrietta B. Power; one-third thereof to my nephew, Peter Rice, of the city of New York; and the balance I give to my executors, to be divided by them among such Roman Catholic charities, institutions, schools or churches in the city of New York, as a majority of my executrix and executors shall decide, and in such proportion as they may think proper.”

The evidence showed that there were, at the death of the testator, regularly organized and incorporated Roman Catholic charities, institutions, schools and churches, located in the city of New York, competent to take the testator's gift; and that, after the death of the testator, Lewis J. White and Hugh Cassidy, the executors of the testator, named in the will, plaintiff having refused to join with them, decided, and in writing, designated ten Roman Catholic institutions of charity, asylums and hospitals, to take the one-third part of the testator's estate, above designated, and the proportions of each; all of which institutions were organized as corporations and capable of taking.

By various orders of the court the ten corporations so designated were, upon their motion, brought in and made parties defendant.

The trial court found, as conclusions of law: That, by the terms of the will, there was an equitable conversion of

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all the testator's real estate into personalty, and that the same, with the personal property, should be sold and converted into money ; that the provisions of the will giving one-third of the residuary estate to the executors, to be divided by them as specified was valid, and that the corporations designated were entitled to take ; that the plaintiff was entitled to the annuity specified, which was a first lien and charge upon the principal of the whole of the testator's estate ; that a sum sufficient to produce such annuity during the life-time of the plaintiff must be set apart and invested by the trustees in said will named, as provided in and by said will, and by law and the rules and practice of this court ; that the said plaintiff is entitled to one-third part of said sum so to be invested to produce such annuity, and the said defendant Rice one other third thereof, and the corporations the other one-third in the proportions provided.

J. W. Gerard, for appellant. By the terms of the will a legal title in the whole estate is vested in the trustees, and is not left in the heirs or donated to the legatees. (*Forsyth v. Rathbone*, 34 Barb., 388; Revised Statute, pt. 11, tit. 2, chap. 1, § 60.) From the general tenor and scope of the will, the parties entitled to the estate are to take it in its converted estate, i. e., as personalty. (*Irish v. Husted*, 39 Barb., 411; *Arnold v. Gilbert*, 5 id., 190; *Dodge v. Pond*, 23 N. Y., 69; *Hatch v. Bassett*, 52 id., 359; *Moncrief v. Ross*, 50 id., 431; *Vail v. Vail*, 7 Barb., 226; 10 id., 69; *Vail v. Vail*, 7 id., 226; 10 id., 269; *Arnold v. Gilbert*, 5 id., 190; *McCaughal v. Ryan*, 27 id., 376.) No trust is raised at all unless there is a definite beneficiary, capable of coming into court and claiming the benefit bestowed. (2 Story's Equity Jur., §§ 979, 964; *Wheeler v. Smith*, 9 How. [U. S.], 55, 79; *Maurice v. Bishop of Durham*, 10 Ves., 521; *Holmes v. Mead*, 52 N. Y., 332; *Delaye v. Greenough*, 45 id., 438; *Wright v. Atkins*, 1 Turn. & Russ., 157; *Levy v. Levy*, 33 N. Y., 97; *Ellis v. Selly*, 1 Myl. & Craig, 286; *Maurice v. Bishop of Dur-*

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ham, 10 Ves., 522; *Norris v. Thomson's Exr.*, 4 C. E. Green; N. J. R., 307; *Stubbs v. Sargon*, 2 Keen's R. [Eng. Roll], 255; again reported, 3 Mylne & Craig [Eng. Ch.], 507; *Ommany v. Butcher*, 1 Turner & Russell, 260; *Nash v. Morley*, 5 Beav., 182; *Sherwood v. Am. Bible Society*, 1 Keyes, 561; *Levy v. Levy*, 33 N. Y., 97; *McCaughal v. Ryan*, 27 Barb., 376; *Downing v. Marshall*, 23 N. Y., 366.) The statutory and other restrictions apply as well to trusts for religious or charitable purposes as to others. (*Ayers v. The Methodist Church*, 3 Sand. [S. C.], 357; *Yates v. Yates*, 9 Barb., 324; *Baptist Asso. v. Hart*, 4 Wheat., 1; *Fontaine v. Ravenel*, 17 How. [U. S.], 369; *King v. Rundle*, 15 Barb., 139; *Voorhees v. Presbyterian Church*, 17 id., 103; *McCaughal v. Ryan*, 27 id. 376; *Sherwood v. Am. Bible Society*, 1 Keyes, 561; *Phelps v. Phelps*, 28 Barb., 121; *Bascom v. Albertson*, 34 N. Y., 584; *Levy v. Levy*, 33 id., 97; reversing 40 Barb., 598; *Bascom v. Albertson*, 34 N. Y. 548; *Le Fevre v. Le Fevre*, 2 N. Y. S. C. R., 339; 59 N. Y., 434; *Holmes v. Mead*, 52 id., 332; *Burrill v. Boardman*, 43 id., 254.) The invalidity of the trust in question will not affect the other trusts. (*Savage v. Burnham*, 17 N. Y., 561; *Darling v. Rogers*, 22 Wend., 482; *Gilman v. Reddington*, 24 N. Y., 9; *Post v. Hover*, 33 id., 593; *Everitt v. Everitt*, 29 id., 99; *Harrison v. Harrison*, 36 id., 543; *Manice v. Manice*, 43 id., 303; *Van Schuyrer v. Mulford*, 59 id., 426.) The third of the residuary estate not validly disposed of by the will, is to be held by the executors subject to the statute of distributions, and there being no children of the deceased or lineal descendants, Mrs. Power, as widow, is entitled under said statute to one-half thereof. (*Le Fevre v. Le Fevre*, 59 N. Y., 434; *Hapgood v. Hoagton*, 22 Pick., 480; *East v. Cook*, 2 Ves. Sen., 30; *Ward v. Ward*, 15 Pick., 511; *Pickering v. Lord Stamford*, 2 Ves. Jun., 272, 581; 3 id., 332, 493; *Pickney v. Pickney*, 1 Brad., 269; *Hatch v. Bassett*, 52 N. Y., 359.) In case Mrs. Power does not take as widow, she would take half of the lapsed legacy as one of the two residuary lega-

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tees, in preference to the next kin. (*Youngs v. Youngs*, 45 N. Y., 254; *Craig v. Craig*, 3 Barb. Ch., 78; 2 Williams on Exrs., 1312, 1313, 1314; *Beekman v. Bonsor*, 23 N. Y., 298; *Easums v. Appleford*, 5 Myl. & Craig, 83, 1837; *Banks v. Phelan*, 1848, 4 Barb., 80-90; 2 Roper on Leg., 453; *Haxtun v. Corse*, 2 Barb. Ch., 506; *James v. James*, 1833, 4 Paige, 117; *Bowers v. Smith*, 1843, 10 id., 193.) Where a testator directs his land to be sold, and the proceeds to be divided or paid over, the obvious purpose is a sale for the convenience of division, and the beneficiaries take their interests as money, and not as land. (*Drake v. Pell*, 3 Edw., 251; *Marsh v. Wheeler*, 2 id., 156; *Kings v. Woodhull*, 3 id., 79; *Meakings v. Cromwell*, 5 N. Y., 136, affirming 2 Sand., 512.) The court should not discharge the estate from the lien of the annuity. (*Pierrepont v. Edwards*, 25 N. Y., 128.)

B. F. Dunning, for appellant Peter Rice. The surplus of the personal property can be used to provide for the annuity payable to the plaintiff, and if insufficient the balance can be taken from the income of the real estate. (*Gourley v. Campbell et al.*, 66 N. Y., 169.) In case the one-third of the residue given to the executors for charitable purposes is for any reason ineffectually disposed of, the widow cannot participate or share in its distribution. (*Chamberlain v. Chamberlain*, 43 N. Y., 424, 441, 446; *Pickering v. Stamford*, 2 Ves., 272; *Pinckney v. Pinckney*, 1 Brad., 269; 43 N. Y., 446; *Beekman v. The People*, 27 Barb., 261, see page 281; *Van Kleeck v. Dutch Church*, 6 Paige Ch., 600; *Downing v. Marshall*, 23 N. Y., 366.)

John E. Develin, for respondents. The clause of the will which makes provision for the Roman Catholic charities and institutions is valid. (2 R. S., 57, §§ 1-3; id., 60, § 21; *Clapp v. Fullerton*, 34 N. Y., 197; *Seguine v. Seguine*, 3 Keyes, 663; *Williams v. Williams*, 4 Selden, 525, 548, 549; *Owens v. Miss. Soc.*, 14 N. Y., 380, 386-406; *Bascom v.*

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Albertson, 34 id., 584; *Adams et al. v. Perry et al.*, 43 id., 487; *Holmes v. Mead*, 52 id., 337; 2 Redfield on Wills, 779; *Lilley v. Hey*, 1 Hare, 580; *Shotwell v. Mott*, 2 Sand. Ch., 46; *Rull v. Rull*, 8 Conn., 48; *McLaughlin v. McLaughlin*, 30 Barb., 458; *Trustee v. Colgrove*, 4 Hun, 362; *Norru v. Thomson's Ex'r*, 19 N. J. R., 307; R. S., part 2, chap. 1, tit. 2, art. 3, §§ 97, 98, 99; 1 R. S., 734; *Post v. Hover*, 33 N. Y., 601; *Dubois v. Ray*, 35 id., 162; *Lefevre, Ex'r, v. Lefevre*, 59 id., 434; *Holmes v. Mead*, *supra*; *Hoey v. Kenny*, 25 Barb., 396.) It is immaterial whether the property given to the executors to divide be real or personal, or both. (R. S., part 2, chap. 4, tit. 4, § 2; 1 R. S., 373; *Campbell v. Foster*, 35 N. Y., 372; *Manice v. Manice*, 43 id., 381, 382; *Gott v. Cook*, 7 Paige, 534, 535.) The designation of these respondents by the two executors to be the beneficiaries, was a valid execution of the power contained in the will. (*Horton v. Garrison*, 23 Barb., 176; *Matter of Church Street*, 49 id., 455.) The executors possess by the will the power to sell the real estate; and although their authority is only permissive, yet if its exercise for the purpose of the will be proper, they are under a duty to sell. The provision in the last clause of the will does not create a trust, but only a power in trust. (1 R. S., 732, § 74.) The court has power to direct an investment to produce the annuity for the widow, and, after a sufficient sum had been invested in good faith to produce that amount annually, to release the estate from further charge on account of it. (*Cook*, 7 Paige, 535.)

MILLER, J. The testator by the first clause in his will gave and bequeathed all his property, both real and personal, to his executrix and executors, "to have and to hold the same * * * upon the trusts, nevertheless, that they are to collect the money due on the bonds and mortgages due to me, and also the rents of my property, and sell and dispose of my stocks; and out of the proceeds of the sale of my property or the income thereof," he directed

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that the sum of \$8,000 a year be paid to his wife in half yearly installments "during her natural life, and to be in lieu of all dower or thirds" in his estate. After making other bequests and conferring power upon his executrix and executors to sell his real and personal estate, he devised one-third of the rest, residue and remainder of his estate to his wife, one-third to his nephew, Peter Rice, and provided as follows: "And the balance I give to my executors, to be divided by them among such Roman Catholic charities, institutions, schools or churches in the city of New York as a majority of my executrix and executors shall decide, and in such proportion as they may think proper."

The first question which arises relates to the validity of the clause last above cited. It is insisted by the counsel of the plaintiff, who is an executrix named in the will and the widow of the testator, that no definite beneficiary capable of taking is designated, and that there is no absolute certainty as to the nature and terms of the bequest; and the well settled doctrine is invoked, that where the conditions of the trust created are so vague and indefinite that a court of equity cannot clearly ascertain either the objects or the persons who are to take, the trust will be held to fail, and the property will fall into the general fund of the author of the trust: (Story Eq. Jur., §§ 964, 979.)

If we give full force and effect to the rule stated and hold that the language employed must be such as to show that the object is certain and well defined; that the beneficiaries are either named or capable of being ascertained within the rules of law which are applicable to such cases; and that the trusts are of such a nature that a court of equity can direct their execution, we are of the opinion that the gift in question was valid and should be upheld.

The clause cited designates a certain class of institutions as objects of the testator's bounty, to which from religious association he was evidently attached, and in whose prosperity we may assume he felt an interest. The terms of the will embraced charities, schools, churches and institutions, to

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which the testator could lawfully have made a direct and valid devise or bequest, and had he selected any of them by name to take a specific portion of his estate, no question would arise as to their right to accept the disposition thus made. That he conferred power and devolved upon a majority of his representatives the duty of designating the organizations which should be entitled to participate in a portion of his estate, and the proportion which each should have in the same, does not, we think, impair or affect the legality of the provision cited, so long as the organizations referred to had an existence recognized by law, were capable of taking, and could be ascertained. The evidence established — and it is beyond any question — that at the time of the execution of the will, and at the time of the testator's death, there were numerous incorporated Roman Catholic benevolent institutions, charities, churches, and schools in the city of New York, which, under the provisions of their several charters, were authorized to take, by devise or bequest, both real and personal estate, and that a portion of these were designated by a majority of the executrix and executors named in the will. The right to make such designation is fully sustained by the decisions of this court. In *Holmes v. Mead* (52, N. Y., 332), it was held that a beneficiary need not necessarily be described by name; that it is not material that a legatee should be definitely ascertained and known at the date of the will, or even at the death of the testator; and it is sufficient, if he is so described, that he can be ascertained and known when the right to receive the gift accrues. In *Le Fevre v. Le Fevre* (59 N. Y., 434), a misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, was held not to invalidate the provision, if, either from the will itself or evidence *aliunde*, the object of the testator's bounty can be ascertained; and to identify a particular corporation, as the one intended, where a wrong name is used, the identity may be proved by parol evidence. Numerous authorities sustain bequests and devises to executors or trustees which confer

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upon them authority to divide the same among such persons as they may select from certain classes which are designated, and among such children or relatives, who are intended to be provided for, whom they may deem proper : (*Liley v. Hey*, 1 Hare, 580 ; *Shotwell v. Mott*, 2 Sandf. Ch., 46 ; *Bull v. Bull*, 8 Conn., 48 ; *McLoughlin v. McLoughlin*, 30 Barb., 458 ; *Trustees v. Colgrove*, 4 Hun, 362 ; *Norris v. Thomson's Ex'rs.*, 19 N. J., 307.)

In the case last cited, which is relied upon by the counsel for each of the parties, the power of appointment authorized a devise by the testator's wife among such "benevolent, religious or charitable institutions as she may think proper;" and it was held to be invalid because it was so vague and uncertain that it could not be enforced. It will be observed that no class of institutions were designated, and the chancellor decides that as the power was to give to any of the three, and as "*benevolent*" institutions were more indefinite and of a wider range than "*charitable or religious*" institutions, and would include all gifts prompted by good will or kind feeling towards the recipient, whether the object of charity or not, the devise was void. The case supports the position that a designation of a class of benevolent institutions would have rendered it valid, and maintains the doctrine contended for by the counsel for the organizations who have been designated by the executors. The cases cited by the appellant's counsel are not in conflict with those already referred to. In *Stubbs v. Sargon* (3 Mylne & Craig, 507; 2 Keen, 255), the testatrix during her life had delivered a note of two thousand pounds to a third person, upon which was indorsed an instrument which declared that the note was given for the sole use and benefit of the holder, independent of her husband, for the express purpose of enabling her to present to either branch of the family of the donor any principal or interest the donee might consider most prudent, with power to dispose of the same by will or deed "to either branch of the family she may consider most deserving thereof;" and it was held that it was a gift upon trust, and

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that the trust failing, the sum secured by the note constituted part of the testatrix's estate. While it may well be that the trust was too indefinite to be executed and hence was void, the case is not analogous to a testamentary disposition for the benefit of organizations which have a legal existence and which can be easily ascertained. But even if the case last cited was favorable to the position claimed, it would, we think, be against the general current of authority which upholds trusts of this character. In *Morice v. The Bishop of Durham* (10 Ves., 522), the devise was for such objects of benevolence and liberality as the trustee in his discretion shall approve; and it was held that it could not be supported as a charitable legacy. The decision was put upon the ground that the word "liberality" meant something different from charity, and hence the bequest was not within the statute of charitable uses. In *Ommanny v. Butcher* (1 Turn. & Russ., 260), the devise was very indefinite, and the principal question considered related to the residuary clause in the will. The case last cited was recently considered in *Kerr v. Dougherty*, and has, I think, no direct bearing upon the question now presented. The other cases cited do not require especial consideration.

The bequests made could only be carried into effect by the selection of organized bodies, and hence no danger is to be apprehended from an improper selection. Nor is there, in my opinion, any difficulty in determining to what class the words "Roman Catholic" apply. It is a well known designation of a denomination of Christians, who have adopted this name, and have distinct tenets, and has been frequently recognized in various legislative enactments in reference to this organization. It has its churches, institutions of learning, charitable and other bodies, which might be easily selected as objects of consideration, as provided by the will. The executors were to decide which of all the institutions known as Roman Catholic were entitled to the benefits to be conferred, and no embarrassment appears to have been experienced in making a selection; nor is it

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apparent why such a disposition of a portion of an estate could not be carried into effect. The rule is well settled that when a gift is capable of being executed by a judicial decree, there is no reason why a court should not execute it: (*Williams v. Williams*, 4 Seld., 578; *Owens v. Mis. Soc.*, 14 N. Y., 408.) Had there been a failure to make the selection as provided, for any reason, within the authorities cited, the court would have power to decree the execution of the trust. The first clause in the will gives all the property of the testator to his executrix and executors in trust for certain purposes specified. So much of the estate only as was necessary to carry these purposes into effect passed under this provision, and the remainder was to be divided as directed. The intention of the testator was plainly manifest as to such remainder, and he had a perfect right to make such a disposition of his estate, after it was converted into personalty. The law does not limit or confine trusts as to personal property, except in reference to the suspension of ownership, and they may be created for any purpose not forbidden by law: (*Bucklin v. Bucklin*, 1 Keyes, 141; *Gott v. Cook*, 7 Pai., 534.) As for the reasons stated the provision in the last clause can be carried into effect, we do not deem it necessary to consider whether it may be regarded as a power in trust under the provisions of the Revised Statutes: (1 R. S., 732, §74; 734, §§ 95-100.

The court were clearly right in deciding that by the terms of the will there was an equitable conversion of all the testator's real estate into personalty. The whole scope and tenor of the will evinces that the testator intended such a conversion, and that the estate should be divided as personal estate. The doctrine of equitable conversion is quite familiar, and the rule on the subject is well settled. It is obvious upon the face of the will that the testator designed that such conversion should be made. The executrix and executors are vested with full power and authority to sell as they may deem proper, and after making ample provisions for the wife of the testator and directing the payment of certain legacies

which are specified, the residue is to be divided ; one-third to the widow, one-third to a nephew, and the "balance" among a class of institutions to be designated, and in proportions to be fixed as directed. The language could not have been more emphatic and direct to carry out the design of a division of the remainder as personal estate. The estate could only be effectually divided, and the purposes of the will efficiently carried out, by converting the real into personal estate ; for otherwise a division would involve a public sale or a partition of the real estate, and lead to embarrassment and expense, and, perhaps, to a serious reduction of the amount which might be realized upon a forced sale of the real property, the avails of which were to be distributed. Any other construction would necessarily interfere with the accomplishment of the benevolent designs and charitable purposes which the testator had in his mind when he made his will, and be adverse to the general rule of interpretation which is applicable in cases of this description.

A point is made that the use of the word "devise" is inapt and inappropriate if confined to the personalty. It is employed in connection with the word "give" in the first part of the last clause in the will, and was pertinent and perhaps essential, in order to cover fully both the real and personal estate. It is, however, qualified and controled by the subsequent words "I give the balance," which could only mean what remained of the personal after the conversion of the real estate into personalty. This last expression does not devise the real estate, but it bequeaths only the "balance" of moneys realized after the real estate had been sold and became personal property, and which remained undisposed of. That the direction to sell was not imperative, is by no means conclusive ; for where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended such real estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not in its terms imperative : (*Dodge v. Pond*, 23 N. Y., 69.)

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Nor is there any valid ground for the claim made by the counsel for the appellant Rice, that the judge erred in holding that the plaintiff was entitled to one-third of the whole residuary estate and one-third of the sum to be invested to produce the annuity provided for by the will. The clause in the will which provides for such annuity states that it is to be in lieu of all dower or thirds in the estate of the testator; but it does not state that it is in the place of all bequests. It was intended to provide against any claim of the widow for dower or thirds in his estate after his death, and not against any provision which might be made in the will in her favor. The subsequent provision in the residuary clause is not, therefore, inconsistent with the provision referred to. It was a gift in addition to that which had been previously bestowed upon the testator's wife, and the intention of the testator is clearly shown by the will to be that both his wife and nephew should share equally in the residuum; and where this is manifest, it is a controlling element in the interpretation of wills. A different construction would give the nephew more than was intended, and should not be upheld for this reason.

It is also quite obvious that the widow, as residuary legatee, is entitled to one-third of the principal set apart for her benefit, out of which the annuity is to be realized. The residuary legatees by the will are entitled to all the remainder, of every name and description, which is not disposed of. This constitutes a part of such remainder and vests at the time of the testator's death, and is payable to the representatives of the widow after her decease.

We discover no objection to the orders made directing that the respondents be brought in as parties defendant. They were interested in the controversy, had a right to be heard, and hence were properly made parties under section 122 of the Code.

No question as to the investment to be made to produce the annuity for the benefit of the widow arises upon this appeal. That is a matter for the Supreme Court, in case

Opinion of the Court, per MILLER, J.

any question shall arise as to the exercise of the power to invest by the trustees.

No other question presented requires examination, and we think the judgment was right and should be affirmed, with costs of all the parties in this court and of the court below to be paid out of the estate.

All concur.

Judgment affirmed.

MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME WHICH ARE NOT REPORTED IN FULL.

**JULIA B. GUMMERSON, Executrix, etc., Respondent, v.
ERASTUS CARROLL et al., Appellants.**

(Argued November 13, 1879; decided November 25, 1879.)

John Van Voorhis for appellants.

H. L. Comstock for respondent.

AGREE to affirm without opinion.

All concur.

Judgment affirmed.

**PETER O. EISENLORD, Appellant v. MAGGIE DILLENBACK,
as Administratrix, etc., et al., Respondents.**

79b 617
a165 40

(Argued November 18, 1879; decided November 25, 1879.)

REPORTED below, 15 Hun, 23.

J. H. Cook for appellant.

N. C. Moak for respondents.

AGREE to affirm on opinion below.

All concur, except CHURCH, Ch. J., and RAPALLO J., dis-
senting, being for reversal on the ground that the indorse-

ment of past due paper creates an absolute liability ; but it is conceded that the current of authorities is to the effect that in such a case a demand within a reasonable time is necessary.

Judgment affirmed.

THE MERCHANTS' BANK OF CANADA, Appellant and
Respondent, v. DE GRASSE LIVINGSTON, Appellant and
Respondent.

(Argued November 19, 1879 ; decided December 9, 1879.)

REPORTED below, 17 Hun, 321.

Samuel Hand for appellant.

H. H. Anderson for respondent.

AGREE to affirm without opinion.

All concur.

Judgment affirmed.

WILLIAM H. H. CHILDS, Respondent, v. THE WILLIAMS-
BURGH CITY FIRE INSURANCE COMPANY, Appellant.

(Argued November 24, 1879 ; decided December 9, 1879.)

E. H. Benn for appellant.

N. C. Moak for respondent.

AGREE to affirm on opinion below.

All concur.

Judgment affirmed.

CATHARINE L. WING, Appellant, v. IRENE G. SCHRAMM,
Respondent.

Under the provision of the act of 1860, in reference to married women (§ 3, chap. 90, Laws of 1860), declaring that no conveyance of real estate, by a married woman, "shall be valid without the consent, in writing, of her husband,"* it was not required that such consent should be a part of or concurrent with the execution of the conveyance, or that it should be given before the delivery thereof; where given thereafter, it validated the conveyance; at least, if given before any attempt, upon the part of the wife, to avoid the conveyance.

(Submitted November 24, 1879; decided December 9, 1879.)

THIS was an action of ejectment brought to recover possession of certain premises in the city of Brooklyn. (Reported below, 13 Hun, 377.)

Plaintiff conveyed the premises to Antoinnette Yenni, by deed dated September 5, 1861; under this conveyance defendant claimed. Plaintiff was at that time a married woman, her husband did not give a written consent to the conveyance until after October, 1862, and after she had obtained a decree of absolute divorce from him, when he signed a written consent indorsed upon the deed. This consent was so indorsed when defendant purchased. *Held*, as above.

Nehemiah Millard and *G. U. Reynolds* for appellant.

C. S. Tracey for respondent.

EARL, J., reads for affirmance of order, and for judgment absolute, against plaintiff on stipulation.

All concur.

Judgment affirmed.

* The section was amended by the act, chap. 72, Laws of 1862, this requirement being omitted.

IN THE MATTER OF THE PETITION OF JANE A. EBBETS, FOR
LEAVE TO REVIVE SUIT.

(Argued November 25, 1879 ; decided December 9, 1879.)

Charles A. Jackson for appellant.

Henry Brewster for respondent.

AGREE to dismiss appeal without opinion.

All concur.

Appeal dismissed.

MARIA L. PLATZ, Respondent, v. THE CITY OF COHOES,
Appellant.

(Argued November 25, 1879 ; decided December 9, 1879.)

G. L. Stedman for appellant.

Rufus W. Peckham for respondent.

AGREE to dismiss appeal without opinion.

All concur.

Appeal dismissed.

OLIVER STANTON, Appellant, v. GEORGE W. MILLER,
Respondent.

(Argued November 25, 1879 ; decided December 9, 1879.)

John Van Voorhis for appellant.

George W. Miller respondent in person.

AGREE to affirm without opinion.

All concur, DANFORTH, J., not sitting.

Order affirmed.

GEORGE S. WILKES, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

79a	621
130	406
79	621
144	496

(Argued December 4, 1879 ; decided December 16, 1879.)

THIS action was brought to recover back alleged illegal assessments upon certain lots in the city of New York, voluntarily paid by the owner, one Burchell, plaintiff's assignor. The assessments were irregular, but had never been vacated or set aside. *Held*, that the action was not maintainable, the court citing *Swift v. City of Poughkeepsie* (37 N. Y., 514) ; *Bank of Commonwealth v. The Mayor, etc.* (43 id., 184) ; *Peyser v. The Mayor, etc.* (70 id., 497). Also, that it was immaterial that assessments laid upon other lots in the same proceeding had been vacated. (*In re Delancy*, 52 N. Y., 80.)

George S. Wilkes for appellant in person.

D. J. Dean for respondent.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

SARAH FOX, Respondent, v. THE GLOBE MUTUAL LIFE INSURANCE COMPANY, Appellant.

(Argued December 5, 1879 ; decided December 16, 1879.)

Fred. I. Small for appellant.

James B. Jenkins for respondent.

AGREE to affirm without opinion.

All concur, except EARL, J., dissenting.

Judgment affirmed.

OLIVER W. MARVIN, Appellant and Respondent, *v.* AUGUSTUS PRENTICE, Appellant and Respondent.

SAME *v.* SAME.

(Argued December 8, 1879 ; decided December 16, 1879.)

Henry C. Willcox for plaintiff.

N. C. Moak for defendant.

Per Curiam mem. for affirmance on opinion below.

All concur.

Judgment affirmed.

IN THE MATTER OF THE PETITION OF ELLEN S. AUCHMUTY TO VACATE AN ASSESSMENT.

Where an order of Special Term, vacating an assessment for a local improvement, is reversed by the General Term on the ground that the assessment should be reduced not vacated, and the case is remitted to the Special Term, that the assessment may be modified in conformity with the principles laid down by the General Term, the order of General Term is not a final order ; and so is not reviewable here.

(Argued December 9, 1879 ; decided December 16, 1879.)

THIS was an appeal from an order of General Term, reversing an order of Special Term, which vacated an assessment upon certain premises in the city of New York, for a local improvement, and remitting the proceedings to the Special Term, to be there modified in conformity with the opinion delivered by the General Term. The opinion was to the effect that the assessment should not have been vacated, but should have been reduced in accordance with the principles laid down therein. *Held* as above.

Timothy F. Neville for appellant.

Francis Lynde Stetson for respondent.

EARL, J., reads for dismissal of appeal.

All concur.

Appeal dismissed.

CHARLES A. SWEET, Appellant, *v.* THE BUFFALO, NEW YORK
AND PHILADELPHIA RAILWAY COMPANY, Respondent.

THIS case presented the same question and was argued
and decided with *Sweet v. B. N. Y. and P. R. Co.* (*ante*, p.
293).

JOHN FAGAN, Respondent, *v.* THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Appellant.

THIS case presented the same questions, and was argued
and decided with *Kennedy v. The Mayor* (*ante* p. 361)

SUSAN B. MILLER, *v.* EDWIN G. BOOTH et al.

SAMUEL B. HIGENBOTAM, Respondent, *v.* HENRY J. CUL-
LEN, JR., Public Administrator, etc., Appellant.

(Submitted November 25, 1879; decided January 13, 1880.)

Henry C. Andrews for appellant. . .

Samuel B. Higenbotam respondent in person.

AGREE to affirm on opinion below.

All concur.

Order affirmed.

IN THE MATTER OF THE PETITION OF EDWARD ROBERTS
TO VACATE AN ASSESSMENT.

IN THE MATTER OF THE PETITION OF FREDERICK BOOS
TO VACATE AN ASSESSMENT.

THESE cases presented the same question, and were decided with *In re Van Buren* (*ante*, p. 384).

WILLIAM A. GUEST, Appellant, *v.* THE CITY OF BROOKLYN
et al., Respondents.

(Argued December 1, 1879 ; decided January 13, 1880.)

THIS action was brought to cancel a tax laid upon a lot owned by plaintiff in the city of Brooklyn; to set aside a sale of said lot for the payment of the tax; and to restrain the giving a certificate of sale or a conveyance. Defendants pleaded a former suit in bar.

The former action (reported 69 N. Y., 506), was to set aside a tax imposed in 1871, for an installment of an apportionment made by the board of assessors of said city, under the act (chap. 383, Laws of 1869), upon said lot for a local improvement, a certain portion of which was to be annually assessed thereon. The present action brought up for review certain alleged errors and irregularities in the same assessment and apportionment founded upon an installment in the tax list for 1872. *Held*, that the former adjudication was binding and conclusive, as it did not appear that the matters presented here differed from those alleged in the former action, or which then existed and might have been alleged, or that they were not within the knowledge of the plaintiff when the former action was tried; that it was necessary for plaintiff to show, to avoid the plea, not only that there were new matters entirely changing the aspect of the case, but that it was not and could not by reasonable diligence have been ascertained by him before.

The court reiterates the doctrine of the former case, that the action was not maintainable, as any person claiming title under the tax sale would have the *onus* of proof as to all the proceedings, including those prior to the assessment-roll. Every step must be shown to be in conformity to the statutory direction authorizing the proceedings. (*Sharp v. Spier*, 4 Hill, 76; *Adams v. S. and W. R. Co.*, 10 N. Y., 328; *Merritt v. Port Chester*, 71 id., 309; *Hilton v. Bender* 69 id., 75.

John J. Townsend for appellant.

Wm. C. De Witt for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

DANIEL E. MERRITT, Respondent, v. JACOB CAMPBELL et al.,
Appellants.

79	625
113	579
79	625
168	380
79	625
77 AD	623

Where a party was called as a witness by the adverse party and was examined as to a transaction with a deceased party in reference to which he would have been precluded from testifying in his own behalf under the Code of Procedure (§ 399), *held*, that the witness was entitled, upon cross-examination, to explain his testimony, and to state the whole transaction.

(Argued October 10, 1879; decided January 13, 1880.)

THE principal question in this case was as to the genuineness of certain alleged signatures of defendants' intestate, which they claimed were forged. The principal question presented on appeal was as to the admissibility of other signatures, for the purpose of comparison in court by experts or other witnesses, or by the jury. The court reiterated the rule laid down in *Miles v. Loomis* (75 N. Y., 288), that such comparisons could only be made by witnesses or the jury,

with signatures properly in evidence; that signatures cannot be introduced for the mere purpose of comparison; nor could a description of them be given by a witness. As this rule was changed by an act of the Legislature soon after the decision was rendered (chap. 36, Laws of 1880), it is not deemed essential to report it in full.

Plaintiff was called as a witness by defendants and testified that the deceased, in 1876, gave him a check for a sum of money. Defendants claimed that this was evidence of a settlement of all previous dealings. Plaintiff, on cross-examination, was permitted to testify under objection and exception that the check was given on a different account from the matters involved in this action. *Held*, no error; that defendants having themselves introduced evidence of the transaction between plaintiff and deceased, they could not shut his mouth as to the explanation, or object to his stating the whole transaction, so as to show that the inference sought to be drawn therefrom was unfounded in fact.

Plaintiff called one Benedict as a witness to prove the genuineness of the signatures of the deceased which were in question. He testified that he had often seen him write and knew his signature, and that signatures were genuine. On cross-examination he stated that the signatures which he had seen were indorsements of checks; that he had not seen these indorsements lately. He was then asked: "You are not quite sure, if you should have those checks before you, and his signature there, but what your opinion might be altered as to them; are you?" This was objected to and excluded. *Held*, no error.

Calvin Frost for appellants.

William A. Beach for respondent.

RAPALLO, J., reads for affirmance.

All concur.

Judgment affirmed.

JULIA A. SHIPMAN, Respondent, v. OSWEGO AND ONONDAGA INSURANCE COMPANY, Appellant.

(Argued December 3, 1879 ; decided January 13, 1880.)

Samuel Hand for appellant.

O. W. Chapman for respondent.

AGREE to affirm without opinion.

All concur, except RAPALLO, J., dissenting and reading opinion.

Judgment affirmed.

JAMES S. BARCLAY, as Trustee, etc., Appellant, v. DAVID W. INGALLS et al., Respondents.

(Argued December 4, 1879 ; decided January 13, 1880.)

James B. Jenkins for appellant.

S. D. White for respondents.

AGREE to affirm without opinion.

All concur.

Judgment affirmed.

JAMES MATTESON, Appellant, v. JOHN F. MOULTON, Repondent.

The "refusal" spoken of in the provision of the statute in reference to bills of exchange (1 R. S., 769, § 11), which declares that one upon whom a bill is drawn and delivered for acceptance, who destroys or refuses to deliver it, shall be deemed to have accepted it, is an affirmative act, or is made up of conduct tantamount to one ; it is also a wilful or wrongful act.

The mere retention, without a demand for a return, or a dissent to the retention, and with the permission of the owner, is not a refusal within the meaning of the statute.

Where, therefore, it appeared that the drawee promised to pay the amount by the time or upon a contingency named, and that the payee, relying upon this, permitted the bill to remain in the hands of the former, and no demand or request for its return, and a denial or evasion thereof was proved, *held*, that the drawee was not chargeable as acceptor of the bill.

Also, *held*, that the promise to pay was void under the statute of frauds (3 R. S., 135, § 2), as it was an oral promise to answer for the debt of another.

(Submitted December 8, 1879; decided January 13, 1880.)

THE complaint in this action alleged, in substance, that one McDonald, for value, executed and delivered to plaintiff his bill of exchange, drawn upon defendant, for \$526.76, which plaintiff delivered to defendant for payment, who has since retained it; that defendant, in consideration of the delivery, and his being permitted to retain the bill, promised to pay the amount thereof. (Reported below, 11 Hun, 268.)

It appeared that plaintiff sent the bill to defendant's office, and left it there; that three days afterward he advised defendant of this, and asked if he was going to pay; stating, if he was not, he wanted the order. Defendant said he could not pay it then, but promised to do so when certain work was done, which he stated would take about two weeks. Plaintiff relied upon this promise, and left the bill. The work was completed, but defendant refused to pay. No demand for the bill was proved. *Held* as above.

There was evidence to the effect that the day before said promise was made by defendant his agent and the plaintiff conferred together as to the state of the drawer's accounts with defendant, and concluded that there was enough, or nearly enough to pay the bill, due the drawer. It did not appear that the order was then charged to the drawer, or credited to the plaintiff, and it appeared that the drawer's accounts on the books still lacked an entry to bring his balance up to the amount of the order. Plaintiff was nonsuited. It was claimed here that the jury might have found, from the evidence, that there was an adjustment of the

account, and that the amount of the bill was charged. *Held*, untenable. First. As there was no such ground of recovery stated in the complaint, nor was it urged on the trial. Second. It was not sustained by the evidence.

Wm. H. Henderson for appellant.

Wm. Woodbury for respondent.

FOLGER, J., reads for affirmance.

All concur.

Judgment affirmed.

JAMES L. STEWART, Respondent, v. MEDAD T. MORSS,
Appellant.

79	629
111	528
79	629
114	455
79	629
148	514

To sustain an exception to the refusal of a referee, to find facts as requested, it is incumbent upon the party to show that the material facts, so requested to be found, were established by uncontroverted evidence, and that if found they would have affected the result.

No question can be raised in this court, upon a matter of fact, in a case tried by a referee, as to which no facts were found by the referee, or requested to be found.

(Argued December 8, 1879; decided January 13, 1880.)

THIS was an action by an attorney to recover for professional services. Defendant set up, by way of counter-claim, neglect on the part of plaintiff resulting in damage. As to one of the matters so alleged, defendant requested the referee to find certain facts, the testimony was conflicting as to the material fact, the referee refused to find as requested, and defendant excepted. As to another matter, no facts were found, or requested to be found. *Held* as above.

Samuel Hand for appellant.

A. Schoonmaker for respondent.

All concur.

Judgment affirmed.

**JOHN MISLAND et al., Respondents, v. EBEN M. BOYNTON,
Appellant.**

Where the deposition of a party, taken before trial, is read thereon without objection, he is not thereby precluded from being examined on trial.

Where evidence which is entirely collateral is drawn out on cross-examination, it cannot be contradicted.

The admissions of a witness out of court are not competent evidence to prove his interest in the litigation.

(Argued December 11, 1879; decided January 13, 1880.)

THIS action was brought to recover the value of a cornish pump and attachments, alleged to have been manufactured by plaintiffs, for and upon the order of defendant (Mem. of decision below, 14 Hun, 625).

Hall, one of the plaintiffs, was examined by defendant before trial. His deposition was read by plaintiffs on trial without objection. He was offered as a witness on behalf of plaintiffs, and was objected to on the ground that he had been so examined and his evidence read by plaintiffs. The objection was overruled. *Held*, no error.

Robertson, an important witness for plaintiffs, was asked on cross-examination, whether he had ever had any difficulty or misunderstanding with defendant, he answered that he never had had any misunderstanding, but that defendant had swindled him out of \$210. The latter part of the answer was not objected to. When defendant was afterwards on the stand, as a witness, he was asked by his counsel, if it was a fact that he had swindled Robertson, he answered "no." He was then asked "what was the fact?" This was objected to and excluded. *Held*, no error, that it was entirely collateral, the only point being as to the existence of ill-feeling.

Robertson was asked on cross-examination whether he had ever said to defendant that he had an interest in the litigation, and was to get a commission, this was objected to and rejected. *Held*, no error, that while it was proper to show that the witness was interested, his admissions were not competent to prove that fact.

N. C. Moak for appellant.

Joseph A. Welch for respondents.

RAPALLO, J., reads for affirmance.

All concur.

Judgment affirmed.

EDWARD BAKER et al., Appellants, v. THOMAS L. DISBROW
et al., Executors, etc., Respondents.

(Argued December 15, 1879; decided January 13, 1880.)

REPORTED below, 18 Hun, 29.

Treadwell Cleveland for appellants.

Martin J. Keogh for respondents.

AGREE to affirm on opinion below.

All concur.

Judgment affirmed.

SARAH E. SULLIVAN, Respondent, v. JOSEPH F. BONESTEEL,
Appellant.

79 631
111 440

The maker of a promissory note, in an action thereon by a transferee, cannot assail plaintiff's title on the ground that the transfer was made in fraud of the creditors of the payee; the transfer can only be assailed on there account by the creditors or some one representing them.

(Argued December 6, 1879; decided January 13, 1880.)

THIS was an action upon a promissory note given by defendant to one Sullivan, for full value. Sullivan transferred the note, with others, to one Evans, to pay a debt of one-third their amount. Sullivan was afterwards, on his

own petition, adjudged a bankrupt ; after he filed his petition, Evans re-transferred the notes to him, and he, before the maturity of the note in suit, transferred it for value to plaintiff. *Held*, that these facts constituted no defense, the court stating the rule as above.

Edward Harris for appellant.

John C. Cochrane for respondent.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

ELIZABETH ALLEN, Respondent, *v.* JEREMIAH EGHMIE,
Appellant.

(Argued December 17, 1879 ; decided January 13, 1880.)

REPORTED below, 14 Hun, 559.

William C. Albro for appellant.

John Thompson for respondent.

AGREE to affirm without opinion.

All concur.

Judgment affirmed.

MARY DAILY Respondent, *v.* CHARLES W. AUSTIN et al.,
Appellants.

(Argued December 8, 1879 ; decided January 13, 1880.)

Samuel Hand for appellants.

Allen Taylor for respondent.

AGREE to affirm without opinion.

All concur.

Judgment affirmed.

THOMPSON SMITH et al., Respondents, v. JOHN M. FALCONER, Impleaded, etc., Appellant.

(Submitted December 19, 1879 ; decided January 13, 1880.)

REPORTED below, 11 Hun, 481.

Edward P. Wilder for appellant.

Charles Whelp for respondents.

AGREE to affirm without opinion.

All concur.

Judgment affirmed.

JOSEPH C. ALGER, Respondent, v. BEMAN S. CONGER, Administrator, etc., et al., Appellants.

(Argued December 12, 1879 ; decided January 13, 1880.)

REPORTED below, 17 Hun, 45.

M. M. Waters for appellants.

R. H. Duell for respondent.

AGREE to affirm without opinion.

All concur, except CHURCH, Ch. J., and MILLER, J., dissenting.

Order affirmed.

HARRIET C. KNAPP, Appellant, *v.* THE NORTH-WESTERN
MUTUAL LIFE INSURANCE COMPANY, Respondent.

(Argued October 14, 1879; decided January 13, 1880.)

C. T. Bartlett for appellant.

W. F. Cogswell for respondent.

CHURCH, Ch. J., FOLGER, ANDREWS and DANFORTH, JJ.,
agree for reversal; MILLER, EARL and RAPALLO, JJ. dis-
sent.

Orders of General and Special Terms reversed.

EDMUND P. SMITH, Respondent, *v.* JAMES SMITH, Appellant.

An estoppel by judgment in a former action arises when the same matter
was at issue therein, and was either litigated by the parties and de-
termined, or it might have been litigated and a decision had upon it.

It is not necessary that it shall appear by the record of the prior suit that
the particular controversy sought to be precluded was then necessarily
tried and determined; it is sufficient if there might have been judgment
in the first action for the same cause alleged in the second.

An estoppel by a former action, effectual as between the parties, arises
also in favor of or against those in privity with them.

Whether the matter might have been tried in the former action must appear
from the record; if it does so appear, oral testimony is competent in the
second action to show that it was litigated, passed upon and determined.

(Argued December 3, 1879; decided January 13, 1880.)

THE complaint in this action alleged in substance that, in
February, 1870, plaintiff executed to defendant his promis-
sory note for \$630.41; that in 1871 the parties had a final
settlement, at which time defendant alleged that he still
owned and held said note; that relying thereon, plaintiff
allowed and paid said note. Whereas, in fact, defendant
had previously for a valuable consideration sold and trans-
ferred the note to one William Smith, and plaintiff was

79 634
114 553

B 634
122 47

B 634
126 380

79b 634

149 152

79b 634

167 248

79 634

Case 2

172 1845

172 1845

compelled to pay the amount thereof to the transferee, and this amount plaintiff sought to recover back. Defendant admitted the giving of the note to him and its transfer, alleged that he immediately gave plaintiff notice of the transfer, and denied the payment. He also set up as a bar that the transferee, William Smith, brought an action in the Supreme Court against the plaintiff upon said note; that plaintiff, in his answer, set up the settlement and payment of the note, and that he had no notice of the transfer at the time of the settlement. Which facts were duly submitted to the jury in that action, and passed upon by them, a verdict rendered, and judgment perfected in favor of said William Smith.

Upon the trial of this action plaintiff produced in evidence the judgment-roll in the action of William Smith against him. His answer in that case alleged that, at the time of the settlement and alleged payment of the note, it was still held and owned by defendant herein. Defendant offered to prove that after the service of the answer in that action William Smith, the plaintiff therein, notified him of this defense, and called upon him to assume the prosecution of that action which he did; that upon the trial the question whether the note was taken into consideration and paid on the settlement was contested, and, that the same was considered and passed upon by the jury, they finding against the plaintiff here. This offer was rejected. *Held*, error, the court stating the general rule as above, and citing the following authorities: *Stowell v. Chamberlain*, 60 N. Y., 272; *Miller v. Manice*, 6 Hill, 121; *Doty v. Brown*, 4 N. Y., 71; *Campbell v. Butts*, 3 id., 173; *Young v. Rummell*, 2 Hill, 478; *Brockway v. Kinney*, 2 J. R., 210.)

A. A. White for appellant.

J. K. Smith for respondent.

Per Curiam opinion for reversal, and new trial.

All concur.

Judgment reversed.

LILLIE A. BUCHANAN, Respondent, v. JAMES BUCHANAN,
Appellant.

(Argued January 13, 1880; decided January 20, 1880.)

J. D. Kernan for appellant.

E. D. Matthews for respondent.

AGREE to dismiss appeal without opinion.

All concur.

Appeal dismissed.

NANCY CORDELL, Administratrix, etc., Respondent, v. THE
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.

(Argued January 14, 1880; decided January 27, 1880.)

Matthew Hale for appellant.

J. H. Clute for respondent.

AGREE to affirm without opinion.

All concur.

Judgment affirmed.

79	636
117	98
117	99

SAUNDERS IRVING, Executor, etc., Appellant, v. JOHN
RANKINE, Administrator, etc., Respondent.

(Submitted January 16, 1880; decided January 27, 1880.)

REPORTED below, 13 Hun, 24.

E. G. Lapham for appellant.

W. H. Adams for respondent.

AGREE to affirm without opinion.

All concur.

Judgment affirmed.

RHODA J. GRIFFIN, Executrix, etc., Appellant, *v.* LEONARD
P. WINNE, Respondent.

(Submitted January 19, 1880; decided January 27, 1880.)

MEM. of decision below, 10 Hun, 571.

Burditt & Brooks for appellant.

J. W. Barnum for respondent.

AGREE to affirm on opinion of court below.

All concur.

Order affirmed and judgment absolute on stipulation.

79	688
158	684

• THE PEOPLE ex rel., JOHN W. SMITH, v. THE VILLAGE OF NELLISTON.*

This court does not lose jurisdiction of a cause brought here upon appeal until the remittitur has been filed in the court below, and that court has taken some action thereon.

Accordingly *held*, that the court had jurisdiction to make an *ex parte* order, correcting a remittitur, which had been filed with the clerk of the court below ; but upon which no action had been taken in that court.

Costs of appeal in proceedings by common law certiorari are not allowable ; whether the proceedings come here upon appeal from a judgment, or from an order superseding the writ.

(Argued December 9, 1879 ; decided December 16, 1879.)

THIS was a motion to vacate an order of this court, directing the attorneys for defendant to return the remittitur for correction as to costs, if erroneous. It appeared that the remittitur had, at the time this order was made, been filed with the clerk below ; but it did not appear that any action had been taken thereon by the court below, an order was then made *ex parte*, correcting the remittitur as to costs.

J. E. Dewey, for motion.

D. M. K. Johnson, opposed.

Per Curiam. There is some uncertainty in the practice as to the precise time when this court loses jurisdiction of a cause brought here upon appeal : (*Burkle v. Luce*, 1 Com., 239; *Martin v. Wilson*, id., 240; *Palmer v. Lawrence*, 1 Seld., 455; *Seacord v. Morgan*, 17 How. Pr., 394; *Wilmerdings v. Fowler*, 15 Abb. Pr. [N. S.], 86; *Cushman v. Hadfield*, id., 109.) For the purpose of settling this uncertainty, we now hold that jurisdiction in this court is not lost until the remittitur has been filed in the court below, and that court has taken some action thereon.

* This case was accidentally omitted in its proper place.

Opinion *per Curiam*.

This court, therefore, had jurisdiction to make the order now complained of.

We have carefully considered the matter of costs, and are of opinion that the respondents should not have costs. Their allowance was not in conformity with our actual decision. The costs on appeal here claimed were in a *certiorari proceeding*, and it matters not in what form the proceeding came before us, *whether upon appeal from a judgment or from an order superseding the writ*. As we have repeatedly decided, the costs are not allowable.

The motion should be denied.

All concur.

Motion denied. .

ERRATA.

In *K. L. Ins. Co. v. Nelson* (78 N. Y., 138), "entitle him" in fourteenth line from bottom of page, should read "entitle it."

In *Weed v. Burt* (78 N. Y., 192), "defendant left plaintiff's" in eighth line from top of page, should read "plaintiff left defendant's."

In *Seeley v. Clark* (78 N. Y., 220), the word "includes" in line three of head note, should read "include."

In *Bockes v. Hathorn* (78 N. Y., 227), the word "was" at end of second line from bottom of page, should be struck out.

In *Heermans v. Burt* (78 N. Y., 259), the word "grantor" in ninth line of head note, should read "grantee."

In *Raymond v. Richmond* (78 N. Y., 351), the word "assignor" in first line of head note, should read "assignee."

In *In re K. C. E. R. Co.* (78 N. Y., 383), the word "to" in third line of head note, should read "from."

In *Arthur v. H. F. Ins. Co.* (78 N. Y., 462), the word "defendant's" in ninth line from bottom of page, should read "plaintiff's."

INDEX.

ACCOUNTS.

1. In an action to recover a balance alleged to be due upon a store account, for goods sold and delivered, where the defense was the statute of limitations, it appeared that defendant had delivered to plaintiff small quantities of butter and eggs at different times to be credited upon the account. *Held*, that the action was "upon a mutual, open and current account, where there have been reciprocal demands between the parties," within the meaning of the provision of the Code of Procedure (§ 95) which declares that in such case the cause of action shall be deemed to have accrued from the time of the last item proved; and that as the last item was within six years the claim was not barred. *Green v. Disbrow.* 1
2. The words "reciprocal demands" in said provision mean no more than "mutual accounts" as used in the former statutes. *Id.*
3. An account of items on one side and payments on the other is not a mutual account; but when goods are delivered by a debtor to a creditor having an account against him it will not be presumed that they are delivered in payment; before they can be held to have been so delivered there must be proof that it was so intended, and that both parties so understood it. *Id.*
4. It is not essential in order to make an account of mutual or reciprocal demands that each party shall have an independent cause of action against the other for his side of the account; the cause of action is only for the balance, and that party is only the debtor against whom the balance is found. *Id.*

ACCOUNTING.

1. In an action for an accounting between a surviving partner and the representatives of a deceased partner, the former is entitled to credit for all sums paid by him to the latter, after their appointment, out of funds collected by him as surviving partner. *Collender v. Phelan.* 366
2. In the case upon appeal, in such an action, it appeared that plaintiff, the surviving partner, testified without objection to payments so made; in a subsequent part of the case it was stated that it was understood plaintiff should produce vouchers; it did not appear what vouchers were wanting, or that there was any application to strike out the testimony in default of such production, nor was there any objection, ruling or exception on the subject of the necessity of the vouchers. *Held*, that this question not having been raised on the trial could not be raised on appeal. *Id.*
3. Plaintiff, in making payments of the indebtedness of the firm, advanced moneys from time to time from his own funds, in excess of the amount in his hands as surviving partner. *Held*, that he was entitled to interest on such advances. *Id.*
4. The findings of the referee did not show upon what particular payments interest was allowed. *Held*, that it could not be claimed that too much interest was allowed, as there was no specific finding disclosing any such error. *Id.*
5. At the time of the death of P., the deceased partner, the firm had contracts for the manufacture and sale of articles under patents be-

longing to the firm or the partners jointly, which contracts were for a period extending beyond the time of such death. It appeared that large profits would have been realized by the firm, had it continued and the other parties had remained solvent, in carrying out said contracts; it did not appear, however, that they had any value aside from the value of the use of the patents. Defendants sold and assigned to plaintiff the interest of their testator at the time of his death in the stock, fixtures, etc., of the firm, and also in said letters patent, and in the lease of the warehouse occupied by the firm, plaintiff agreeing to assume and pay all salaries due employees, etc., accruing subsequent to the death of P. In none of the writings was any reference made to the outstanding contracts, *held*, that the transfers, etc., afforded a strong inference that the intent of the parties was that plaintiff should continue the former business on his own sole account, and that no benefit was intended to be reserved to defendants from manufactures under said contracts; and that a finding that defendants were not entitled to any credit or allowance on account of the contracts was justified. *Id.*

6. In an action for an accounting, brought by the executors of a deceased partner against the surviving partner of a firm, a judgment was rendered directing defendant to pay over to a receiver a specified sum, and to turn over to him the partnership assets remaining, out of which the receiver was directed to pay plaintiffs, a sum stated, and to divide the residue; thereupon a judgment was docketed in favor of plaintiffs, against defendant, for the amount the latter was required to pay; on motion to vacate the docket in this particular, *held*, that it was not authorized by the judgment, and was properly vacated; that the docket, if any was authorized, should have been in favor of the receiver; that it was not sufficient that it appeared, plaintiffs would be entitled to as large or a larger sum when the judgment is fully carried

out; there was no personal money judgment between the parties, the money required to be paid the receiver was partnership money, and the demand of plaintiffs was to be paid by the receiver from firm assets. *Geery v. Geery*. 565.

7. In an action for a dissolution of a copartnership, and for an accounting between the partners, the answer alleged a violation on the part of plaintiff of a provision in the articles of copartnership, providing for a sale of the good will of the business to such of the partners as should bid the highest price, by his appropriating to himself the good will, and that the same was worth as an asset \$200,000, which he asked to counter-claim against any sum found due the plaintiff. As a further counter-claim the answer alleged a fraudulent misappropriation by plaintiff of partnership funds. *Held*, that the matters so set up did not present a counter-claim, of a separate and distinct cause of action, within the meaning of said section; that the matters set up were proper items to be proved upon an accounting; and that defendant was not entitled to a trial by jury thereon. *Cook v. Jenkins*. 575

8. As to whether a separate cause of action could be maintained to recover the value of the good will, or for damages without an equitable accounting of the copartnership affairs, *quære*. *Id.*

ADMISSIONS AND DECLARATIONS.

— *Of third person on trial of indictment for perjury, when competent as part of res gestæ.*
See *Highmy v. People*. 546

ADVANCEMENTS.

1. Under the provision of the statute of distributions in reference to advancements (2 R. S., 97, § 76), the descendants of a child of an intestate, who died before him, are entitled, on the final distribution of

his estate, when it consists exclusively of personal property, to the benefit of advancements made by him in his life-time to his other children, and such advancements are to be taken into consideration in determining the distributive shares. *Beebe v. Estabrook*. 246

2. The word "children," as used in said provision, includes all the descendants of the intestate entitled to share in his estate. *Id.*
3. The provisions of said statute and of the statute of descents on the subject of advancements (1 R. S., 752, § 23) are to be taken and construed together, as the two statutes are in *pari materia*. *Id.*

ADVERSE POSSESSION.

1. A person, claiming land under a defective conveyance, having entered into actual possession of a part claiming the whole, may have constructive possession of the residue. *Thompson v. Burhans*. 93
2. This is so, however, only when the part not actually possessed is for use with, or subservient to, that so possessed; it must have some necessary connection therewith. *Id.*
3. In an action of ejectment plaintiff claimed under a void deed from the State comptroller, executed in 1836, purporting to convey, with other lands, the north-west quarter of a certain township containing 6,300 acres. Defendant unlawfully entered into possession of 2,000 acres of the north part of the said quarter. Plaintiff gave evidence to the following effect. He had paid the taxes on the land claiming title thereto, and caused the same to be surveyed. About 1852 he caused some lots to be surveyed in the north-west corner of said quarter, lot one containing 950 acres. In 1856 one R., under an arrangement with plaintiff, cut from this lot a quantity of logs, paying plaintiff therefor. In 1864 plaintiff hearing that defendants intended to enter upon the land, arranged with R. to go upon it, cut some logs, and build a

shanty for the purpose of thus gaining possession. R. that winter went upon said lot one, cut logs and built a shanty without a roof, cutting over less than a quarter of an acre, and remaining thereon about three weeks; in the summer of 1865 R. put a roof on the shanty, and built a barn. In the winter of 1865-1866 after the commencement of the action R. went upon the said lot under plaintiff, cut roads and cut a large quantity of logs. *Held*, that plaintiff did not show such possession as entitled him to recover for anything more, at most, than the small piece of cleared land upon which was the shanty and barn. *Id.*

4. In 1808, Matthew and Martha Codd, the parents of plaintiff, being each the owner in fee of certain real estate, joined in a deed by its terms conveying to certain trustees named, "their heirs and assigns," all the lands, etc., of which the grantors, or either of them, were seized, in trust: 1st. To sell and dispose of so much thereof as should be necessary to pay all debts then subsisting against the grantors. 2d. To lease, etc., the residue, the net profits and avails to be paid Matthew during his life for the support of the grantors and their children; if Martha survived then to her during her life for the maintenance of herself and children. 3d. The trustees, the survivor of them and the heirs and assigns of said survivor, to hold all the residue not sold to pay debts, "for the sole use, benefit and behoof of such persons as shall be the right heirs" of the grantors at the time of the death of the survivor; reserving to the grantors power by will or appointment to direct to whom, upon the death of the grantors, the residue of the estate should go. 4th. Upon request of the grantors, in the discretion of the trustees, to sell and convey any portion of said lands. Plaintiff was living at the time of the execution of this deed. Martha, the survivor of the grantors, died in 1871. In an action of ejectment, commenced in 1874, to recover lands of which Martha was seized in fee at the time the deed

fact must be shown with a reasonable degree of certainty. *Id.*

7. The use of the ballots so preserved, as evidence, is not limited to cases of city officers merely, they are admissible as well in cases of other officers voted for in the city of Brooklyn. *Id.*

8. In an action of *quo warranto* wherein the ballot-boxes were produced and the ballots received in evidence to impeach the accuracy of the returns of the inspectors of election, and wherein it appeared that the boxes had not been sealed up by the canvassers, and had been kept insecurely, so that the question whether the ballots were the identical ones voted was one of fact for the jury, the court instructed the jury, in substance, that to justify their rejection, it must appear affirmatively by direct evidence, or from circumstances, that the boxes had been tampered with, *held*, error; and that the error was fatal to the judgment. *Id.*

— *When action not maintainable to set aside assessment or sale thereunder, also effect of former adjudication as a bar to such action.*

See Guest v. City of B. (Mem.) 624

BUFFALO (CITY OF).

1. The act entitled, "an act authorizing the common council of the city of Buffalo to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore or margin of Lake Erie" (chap. 547, Laws of 1864), authorized the taking of a fee in lands required for the purpose specified; and under proceedings for that purpose taken as prescribed by the act which gave to the city all the interest authorized by the act, it acquired an absolute fee. *Sweet v. Buffalo, N. Y. and Phil. R. R. Co.* 294
2. The fact that the particular purpose for which the land was to be taken is expressed in the title and in the act does not qualify the

estate taken; the purpose so declared simply regulates and defines the use for which the land shall be held. *Id.*

BURDEN OF PROOF.

In a suit by a vendor to recover goods from one claiming title under a fraudulent vendee, the burden is upon the latter of showing that he is a purchaser in good faith and for value. *Stevens v. Brennan.* 254

— *Surrender by sheriff of property attached without calling a sheriff's jury throws upon him burden of showing that property was not subject to attachment.*

See Munper v. Rushmore. 19

— *When burden of proof is upon party producing ballot-boxes and ballots in city of Brooklyn as evidence under the act chapter 575, Laws of 1872, to show that the boxes have been kept undisturbed and inviolate.*

See People ex rel. v. Livingston. 279

CANALS.

1. The canal commissioners having entered into a contract with M. to do certain work, which was of public necessity, and M. having refused to go on with the work because of the refusal of the canal auditor to audit and allow certificates of the commissioners, on the ground that there was no unexpended appropriation to pay them, the relator, at the request of the commissioners, for the purpose of expediting the work, advanced the money required to complete it, in reliance upon a future appropriation by the Legislature, and the certificates were assigned to him. The acts of the commissioners in respect to the work were communicated to the Legislature, from time to time, in the official reports of the commissioners, which stated the amounts expended and the purposes of the expenditure in accordance with the facts. In 1875 a budget was made up in the auditor's office of out-standing cer-

tificates, issued for work done on the canal, and furnished to the Legislature when engaged in making an appropriation to pay the same; in which budget the certificates so held by relator were specifically described and included, and an appropriation was made to the precise amount of the budget (§ 1, chap. 233, Laws of 1875). In proceedings to compel the auditor by mandamus to draw his warrant for the amount of the certificates; *held*, that the facts authorized a finding, that the act making an appropriation was passed with full knowledge on the part of the Legislature, and with the intent to provide specifically for the payment of said certificates; that the fact that the appropriation was made for this purpose having been established, the questions of ratification or knowledge of the Legislature of the facts relating to the contract, and of the validity of the contract were unimportant; and that the relator was entitled to the relief sought. *People ex rel. Sage v. Schuyler.* 189

2. Also *held*, that said appropriation was not repealed by the repealing clause in the act of 1876 (§ 1, chap. 425, Laws of 1876), providing "for the completion or cancellation of all pending contracts" for new work upon or extraordinary repairs of the canals. *Id.*

CANCELLATION OF WRITTEN INSTRUMENT.

1. An action to procure the cancellation of a written instrument cannot be maintained, unless some special circumstance exists establishing the necessity of a resort to equity, to prevent an injury, which might be irreparable and which equity alone is competent to avert; it is not sufficient that a defense exists as against the instrument, or that evidence may be lost. *Globe Mut. Life Ins. Co. v. Reals.* 202
2. In an action to procure the cancellation of a policy of life insurance, the complaint alleged that the policy was obtained by fraud

and conspiracy between plaintiff's agent and the insured; that the premium was not paid in cash, as required by the policy, but by the note of the insured, and was delivered to the latter when he was sick, of which sickness the insured died. The complaint also averred that plaintiff feared the holder of the policy would commence an action thereon, and by collusion with said agent obtain an appearance on its behalf, and from failure to answer, or to duly defend the action, obtain a judgment without plaintiff's knowledge, thus preventing plaintiff from presenting its defense, or that defendants would delay bringing an action until the evidence of fraud and conspiracy was lost. The referee found that there was no fraud; the other facts were found substantially as alleged in the complaint. *Held*, that the complaint was properly dismissed. *Id.*

CASES DISTINGUISHED, LIMITED, QUESTIONED, REVERSED AND DISAPPROVED.

Gold v. Whitcomb (14 Pick., 188), distinguished and limited. *Green v. Disbrow.* 11

Adams v. Carroll (55 Penn., 209), distinguished and limited. *Green v. Disbrow.* 12

Lowber v. Smith (7 Barr. [Penn.], 381), questioned. *Green v. Disbrow.* 12

Peck v. N. Y. and L. [U. S.] M. S. S. Co. (3 Bosw., 622), distinguished and limited. *Green v. Disbrow.* 13

Westbrook v. Gleason (14 Hun, 245), reversed. *Westbrook v. Gleason.* 23

Thompson v. Loan Commissioners (16 Hun, 86), reversed. *Thompson v. Loan Commissioners.* 54

Thompson v. Burhans (15 Hun, 580), reversed. *Thompson v. Burhans.* 93

- when the insurance was procured, informed O. of the nature of their interest, and he omitted to describe it in the policy, defendant would be deemed to have waived the condition, and it could not be assumed that this was not done. *Richmond v. Nia. F. Ins. Co.* 230
12. A receiver of a life insurance company obtained an order as prescribed by statute (2 R. S., 467, § 56), for publication of notice to creditors, requiring them to exhibit their claims within a time specified. Before the expiration of the time the receiver addressed a circular to policy-holders, to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further proof; misled by such circular the holders of such policies did not make proof of their claims. These were objected to by other creditors, and were rejected by the referee to whom it was referred to take proof as to distribution of the assets. Whereupon, and before any dividend had been made, the receiver applied for and obtained an order giving two months further time within which such claims could be presented and established before the referee. *Held*, that the receiver was authorized in making the application; that the court had power, in its discretion, to grant it; and that the exercise of this discretion was not reviewable here. *In re Peo. ex rel. v. Secur. L. Ins. and An. Co.* 267
13. An order punishing for contempt, in violating an injunction, can only be reviewed, upon the merits or for alleged legal error, on appeal from the order. *Watrous v. Kearney.* 496
14. It is within the discretion of the court whether to open or vacate the order on motion, and the exercise of this discretion cannot be reviewed here. *Id.*
15. This court can only review judgments and grant new trials for errors of law; and such errors must be pointed out by exceptions taken at a proper time. *Standard Oil Co. v. Amazon Ins. Co.* 506
16. Where, therefore, it is alleged that a verdict is perverse, excessive in amount, and contrary to the law and the evidence, the judgment entered thereon cannot be reviewed here without an exception. *Id.*
17. This rule has not been changed by the provision of the Code of Civil Procedure (§ 939) in reference to the granting of a new trial by the judge presiding at the trial. *Id.*
18. For such errors, *it seems*, the General Term has power to grant a new trial in its discretion, although no exceptions were taken on the trial. *Id.*
19. The provision of the Code of Civil Procedure (§ 1342), in reference to appeals to the Supreme Court from orders of a County Court, confines the appellate jurisdiction to orders in actions originating in the County Court. *Andrews v. Long.* 573
20. Accordingly, *held*, that an order of County Court dismissing an appeal from a judgment of a justice of the peace, was not appealable to the Supreme Court. *Id.*
21. Where, upon the facts presented, the allowance of a supplemental pleading is in the discretion of the Supreme Court, the exercise of this discretion by the Special Term may be reviewed by the General Term, but not by this court. *Fleischmann v. Bennett.* 579
22. Where an order of Special Term, vacating an assessment for a local improvement, is reversed by the General Term on the ground that the assessment should be reduced not vacated, and the case is remitted to the Special Term, that the assessment may be modified in conformity with the principles laid down by the General Term, the order of the General Term is not a final order; and so is not reviewable here. *In re Pet. Auchmuty.* 622

23. To sustain an exception to the refusal of a referee, to find facts as requested, it is incumbent upon the party to show that the material facts, so requested to be found, were established by uncontroverted evidence, and that if found they would have affected the result. *Stewart v. Morss.* 629

24. No question can be raised in this court, upon a matter of fact, in a case tried by a referee, as to which no facts were found by the referee, or requested to be found. *Id.*

25. This court does not lose jurisdiction of a cause brought here upon appeal until the remittitur has been filed in the court below, and that court has taken some action thereon. *People ex rel. v. Village of N.* 633

26. Accordingly held, that the court had jurisdiction to make an *ex parte* order, correcting a remittitur, which had been filed with the clerk of the court below; but upon which no action had been taken in that court. *Id.*

27. Costs of appeal in proceedings by common law certiorari are not allowable; whether the proceedings come here upon appeal from a judgment, or from an order superseding the writ. *Id.*

— *Order of Supreme Court refusing to quash a writ of certiorari removing an indictment into that court from the Oyer and Terminer, not reviewable here.*
See Jones v. People. 45

— *Sufficiency of exception to present questions on.*
See F. N. Bank v. Dana. 108

— *When action was in form against defendant as executor when it should have been against him individually, but objection was not taken below, and the result is the same. Held, that the action would be treated as if defendant was sued individually.*
See Brown v. Knapp. 136

— *Question not raised below cannot be presented upon appeal.*
See Kirkpatrick v. N. Y. C. and H. R. R. Co. 240

— *When question not raised below cannot be raised on appeal; also, to reverse conclusions of law by referee it must appear from the facts found that they are erroneous.*
See Collender v. Phelan. 366

— *Where a motion for judgment on return to a writ of certiorari in proceedings before the mayor of New York city to remove a police commissioner is allowed to be heard upon order to show cause on less than eight days notice, the propriety of granting the order is reviewable.*
See People ex rel. v. Nichols. 582

APPROPRIATIONS.

1. Where an appropriation, within the power of the Legislature, is made by it, no inquiry is admissible as to the reasons, or information upon which it acted. *People ex rel. Sage v. Schuyler.* 189

2. Where a work of public necessity is done under an invalid contract, or even voluntarily, without the authority of any public officer, and the Legislature appropriates money to pay for it, a disbursing officer cannot refuse to apply the money to the purpose for which it was appropriated, on the ground that the State was not originally under any legal obligations to make payment, or that the Legislature was not sufficiently informed of the facts; the only question for such officer is whether the appropriation was for the purpose claimed; when this is ascertained his duty is ministerial only. *Id.*

3. The canal commissioners having entered into a contract with M. to do certain work, which was of public necessity, and M. having refused to go on with the work because of the refusal of the canal auditor to audit and allow certificates of the commissioners, on the ground that there was no unexpended appropriation to pay them, the relator, at the request of the

commissioners, for the purpose of expediting the work, advanced the money required to complete it, in reliance upon a future appropriation by the Legislature, and the certificates were assigned to him. The acts of the commissioners in respect to the work were communicated to the Legislature, from time to time, in the official reports of the commissioners, which stated the amounts expended and the purposes of the expenditure in accordance with the facts. In 1875 a budget was made up in the auditor's office of out-standing certificates, issued for work done on the canal, and furnished to the Legislature when engaged in making an appropriation to pay the same; in which budget the certificates so held by relator were specifically described and included, and an appropriation was made to the precise amount of the budget (§ 1, chap. 263, Laws of 1875). In proceedings to compel the auditor by mandamus to draw his warrant for the amount of the certificates; *held*, that the facts authorized a finding, that the act making an appropriation was passed with full knowledge on the part of the Legislature, and with the intent to provide specifically for the payment of said certificates; that the fact that the appropriation was made for this purpose having been established, the questions of ratification or knowledge of the Legislature of the facts relating to the contract, and of the validity of the contract were unimportant; and that the relator was entitled to the relief sought. *Id.*

4. Also *held*, that said appropriation was not repealed by the repealing clause in the act of 1876 (§ 1, chap. 425, Laws of 1876), providing "for the completion or cancellation of all pending contracts" for new work upon or extraordinary repairs of the canals. *Id.*

ASSAULT AND BATTERY.

1. The provision of the act of 1879, extending the jurisdiction of Courts of Special Sessions (chap. 390, Laws of 1879), which gives to said

courts exclusive jurisdiction in the first instance, to hear and determine, among other things, "charges for assault and battery, not alleged to have been committed riotously," did not oust Courts of Sessions of jurisdiction to try pending indictments for that offence; it applies only to charges made subsequent to the passage of the act. *Ryan v. People*. 593

2. *It seems*, that the word "charges" implies an original complaint made in the first instance, preliminary to a formal trial for a crime, it does not include indictments.

Id.

3. Upon the trial of an indictment for assault and battery, the offence was alleged to have been committed during an affray at a town meeting; one of the witnesses for the prisoner was asked on cross-examination whether he had been indicted, for assault and battery, committed on that day, this was objected to, objection overruled, and the witness answered "yes," *held*, that it was a fair inference that the witness was indicted as one of the participants in the affray; and that the question was competent to show the position he occupied, in respect to the controversy, out of which the affray arose, and his interest in the litigation, and as showing prejudice or bias. *Id.*

4. *It seems*, that the mere fact that a witness has been indicted, cannot legitimately tend to discredit him or impeach his moral character, and that evidence thereof is therefore incompetent; (FOLGER and EARL, JJ., dissenting, and holding that the allowance of questions on cross-examination of a witness, as to his having been indicted, are in the discretion of the court). *Id.*

5. One of the witnesses for the prosecution, when asked what he saw of the occurrence, answered among other things, "I should judge he (the complainant) struck a stone," this was on motion struck out, *held*, no error, as it was not

responsive to the question, and was a conjecture, not knowledge. *Id.*

6. Also *held*, that evidence that the prisoner made an effort to keep out of the way of the sheriff was competent. *Id.*

7. *It seems*, however, that such evidence is very slight, if any evidence of guilt. *Id.*

ASSESSMENT AND TAXATION.

1. The only power conferred upon the board of health by the provisions of the act of 1871, "to provide for the proper drainage of lands," in the city of New York (chap. 566), is to direct the drainage of land by means other than sewers, where surface water, injurious to public health, could not be carried off by the sewers; and to assess the expense upon lands benefited by the drain, the area of assessment being restricted to the lands between the drain and the adjacent streets and avenues. *In re Van Buren.* 389

2. The commissioner of public works, in pursuance of a requisition of the board of health, directing him to cause the lands within certain bounds, which included many blocks and about seventy acres of sunken land, to be drained by other means than sewers, caused drains to be dug and the lands to be filled in, the whole cost of the improvement being about \$308,000, of which only \$5,491.20 was for drains; \$248,534.27 of the cost was assessed in one assessment upon the property owners, blocks of land being assessed through which the drains did not run. *Held*, that said act did not authorize such improvement; also that, even if the filling in could be claimed as merely an incident to the construction of the drains, the assessment was illegal, as there was no authority for mingling in one assessment the costs of drains running between different streets. *Id.*

3. An assessment roll is akin to a judgment, and if an assessment is erroneously discharged of record, its lien cannot be restored so as

to affect *bona fide* purchasers, or others standing in a similar relation, whose transactions were entered into in ignorance of the error and in reliance upon the truth of the record. *Curnen v. Mayor, etc.* 511.

4. In an action to compel the defendant to discharge a lot in the city of New York belonging to plaintiff from the lien of certain assessments, and to discharge the same of record, it appeared that before plaintiff paid the purchase price for the lot, she ascertained, at the proper office, from the official records, that two assessments, laid in July and August, 1872, upon the lots, were marked upon the record of assessments as "paid by Killian Brothers, * * * March 7, 1873." Plaintiff thereupon, after deducting certain assessments which appeared in the records unpaid, paid the balance of the purchase money and received a deed in November, 1873. These assessments were, in fact, paid at the time stated, by Killian Brothers, they supposing the lot was their's, when, in fact, it was not; and the entry was then made by the official having charge of the record. In August, 1876, Killian Brothers commenced an action against defendant to recover back the moneys so paid, alleging they were paid through mistake. Plaintiff was not made a party, and had no notice or knowledge of the action. Defendant served an offer allowing judgment to be entered therein for the amount claimed; judgment was so entered to that effect, and also directing that the entries of payment be cancelled, which was done. *Held*, that plaintiff was entitled to the relief sought; that the fact that the payment was entered as made by Killian Brothers was not sufficient to put plaintiff upon inquiry or charge her with constructive notice of the error; nor was the fact, that in making and receiving the payment, the parties acted under a mistake, material so far as plaintiff was concerned. *Id.*

5. Also, *held*, that the provision of the act of 1853 in relation to the

collection of arrears of taxes, etc., in the city of New York (§ 16, chap. 579, Laws of 1853), providing for the obtaining of receipts or certificates from the clerk of arrears showing payment of assessments, had no application; as it relates only to assessments which have been due twelve months and over, while the assessments in question were paid within nine months after they were due, and while they were still in the collector's office. *Id.*

6. *It seems*, that such receipts or certificates are not the only evidence of the removal of the liens of assessments, even as to those specified. *Id.*

7. Where an order of Special Term, vacating an assessment for a local improvement, is reversed by the General Term on the ground that the assessment should be reduced not vacated, and the case is remitted to the Special Term, that the assessment may be modified in conformity with the principles laid down by the General Term, the order of General Term is not a final order; and so is not reviewable here. *In re Pet. Auchmuty.* 622

— *Action not maintainable to recover back an assessment voluntarily paid, which was irregular but had not been vacated, although assessment on other lots in the same proceeding had been vacated.*

See Wilkes v. Mayor. (Mem.) 621

— *A judgment in an action brought to set aside a tax for an installment of an assessment because of alleged irregularities in the assessment is a bar to an action to recover a subsequent installment. Also, action to set aside assessment as cloud on title not maintainable as the onus of showing regularity would be upon one claiming under the assessment.*

See Guest v. City of B. (Mem.) 624

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. Notwithstanding a levy under an execution upon his personal property, the judgment debtor remains owner; and can convey title, sub-

ject to the lien created by the execution. *Mumper v. Rushmore.* 19

2. An assignee for the benefit of creditors, of the debtor, acquires a title subject to such lien, good against all persons until the assignment is impeached for fraud. *Id.*

3. Where the property is in the possession of the sheriff at the time of the assignment, the transaction is not within the provision of the statute of frauds (2 R. S., 136, § 5), which requires an immediate delivery of goods sold; that applies only to a sale of goods in the vendor's possession or under his control. *Id.*

ATTORNEY.

1. Where a party has been brought into court on attachment, in proceedings to punish for contempt, he may be represented by attorney in the subsequent proceedings. *Watrous v. Kearney.* 496

2. An order punishing defendants for contempt was granted by default. On motion to vacate the order, it was alleged, in the moving papers, that the attorneys who appeared for the defendants in the proceedings had no authority. The attorney who appeared on return of the attachment, made affidavit that he was authorized; the defendants were also personally present; the same attorney appeared before the referee, to whom it was referred, to take proofs. Notice of motion for final order was served on, and service admitted by, attorneys who had appeared for defendants in the action, and who had also admitted service of the referee's report. *Held*, that as the attorneys thus undertook to represent defendants, the mere allegation of want of authority so to do did not invalidate the order. *Id.*

AUDITOR OF CANAL DEPARTMENT.

— *When he cannot question legislative appropriation.*

See People ex rel. v. Schuyler. 189

BANKS AND BANKING.

1. Under its charter (chap. 816, Laws of 1868) the People's Safe Deposit and Savings Institution had power to loan its capital and funds, but was restricted in its investments to such securities as are specified in its charter (§ 11); this did not include commercial paper. *Pratt v. Short* 437
 2. Accordingly *held*, that as the discounting of commercial paper is prohibited by statute (1 R. S., 712, §§ 3, 6), to any corporation not authorized by law so to do, and as paper so discounted is declared void, that a promissory note discounted by said corporation was void. *Id.*
 3. But, *held*, that the illegal action of its directors in thus investing its funds did not work a forfeiture of the money loaned, and that this might be recovered, although the security was void. *Id.*
 4. The history of the restraining acts given, and the authorities on the subject collated. *Id.*
 5. Defendant E. executed his bond and mortgage to secure the People's Safe Deposit and Savings Institution, for any indebtedness it had against the mortgagor, "upon or by reason of any promissory note, bill of exchange, overdraft, or otherwise." Subsequently said corporation loaned to the mortgagor various sums of money upon the discount of his notes, which expressed that the maker had deposited the bond and mortgage as collateral. In an action to foreclose the mortgage, *held*, that the notes were void, as the corporation had no power, under its charter, to loan money on personal security (chap. 816, Laws of 1868), and was prohibited by statute from discounting commercial paper (1 R. S., 712, §§ 3, 6); but that the corporation was authorized by its charter (§ 11) to invest in bonds and mortgages; that there was a loan which was within the condition of the mortgage; that the fact that the loan was made by way of discount, and upon the security of the notes, as well as of the mortgage, did not vitiate the latter; and that it was a valid security for the loan and enforceable as such. *Pratt v. Eaton*. 449
 6. In an action upon a promissory note of \$2,400, it appeared that the note was indorsed by defendant W. for the accommodation of the makers, of which fact plaintiff had notice. The note was delivered by the makers to plaintiff's cashier, who indorsed it, and at their request procured it to be discounted by another bank, plaintiff receiving a compensation for procuring the discount. On, or prior to, the day the note fell due, the makers delivered to plaintiff another note, being one of several indorsed by W., and delivered to the makers to take up the note in suit, and other notes previously indorsed by him; plaintiff's cashier was directed to apply the proceeds to take up the paper so indorsed. It did not appear that this direction was revoked. The proceeds were credited to the makers. It did not appear that plaintiff, at that time, held any paper so indorsed by W., save the note in suit, which it had taken up. A few days after, the makers drew a check on, and delivered it to, plaintiff for \$2,731.62, payable to "notes, etc., or bearer." No money was paid the drawers thereon, and it did not appear that the proceeds of the note had been drawn out. *Held*, that the plain inference from the transaction was that the check was given to pay the note in suit, and that it was paid thereby; and that in the absence of any proof rebutting this presumption, a finding of non-payment was error. *Nat. Bank Gloversville v. Wells*. 498
 7. It seems, that a national bank has no power to loan its credit and become an accommodation indorser of a promissory note. *Id.*
- It seems, that where money, obtained by fraud, is deposited by the perpetrator of the fraud in bank, while it remains on deposit, the per-

son defrauded can compel the bank to restore it.

See Stephens v. Board of Education. 183

See SAVINGS BANKS.

BENEVOLENT, CHARITABLE, SCIENTIFIC AND MISSIONARY ASSOCIATIONS.

1. A corporation chartered by special act may, by appropriate language, be made subject to the provisions of the general act of 1848 (chap. 819, Laws of 1848, amended by chap. 51, Laws of 1870), providing for the incorporation of benevolent and other societies, which restricts the capacity of such corporations to take under a will. *Kerr v. Dougherty.* 827
2. The provision of the act of 1870 (chap. 129, Laws of 1870), amending the act of 1839 (chap. 99, Laws of 1839), incorporating the Union Theological Seminary of the city of New York, which limits the power of that corporation to take and hold by gift, grant or devise, by subjecting it "to all the provisions of law relating to devises and bequests by last will and testament," make applicable to said corporation the provision of said act of 1848 (§ 6), which declares that no devise or bequest to any corporation formed under it, by one leaving wife, child or parent, "shall be valid in any will which shall not have been made and executed at least two months before the death of the testator." (RAPALLO and EARL, JJ., dissenting.) *Id.*
3. The said provision of the amended charter also includes the provisions of the act of 1860 (chap. 360, Laws of 1860), "relating to wills," prohibiting devises or bequests to certain societies to more than one-half of the testator's estate. *Id.*
4. The said act of 1860 is not inconsistent with said two months clause in the act of 1848, and does not repeal it. *Id.*
5. The effect of the amendment of said charter, in the particular

above mentioned, was not destroyed by the amendment of 1870 (chap. 51, Laws of 1870), to said act of 1848. *Id.*

6. Accordingly *held* (RAPALLO and EARL, JJ., dissenting), that a bequest to said corporation in the will of a man who died within a month after the execution thereof, leaving a wife surviving, was void. *Id.*
7. Also *held* (RAPALLO and EARL, JJ., dissenting), that a bequest to the New York City Mission and Tract Society was void because of a similar provision of its charter (chap. 63, Laws of 1866). *Id.*
8. The provision of the act of the Legislature of Pennsylvania of 1853, relating to corporations, etc., which prohibits devises or bequests to any body politic, or person in trust, for religious or charitable uses, unless by will executed at least one month before the death of the testator, relates to and affects the power to take as well as the power to devise (RAPALLO and EARL, JJ., dissenting). *Id.*

BEQUESTS.

— *To benevolent, charitable and religious corporations, when void.*
See Kerr v. Dougherty. 827

BILLS, NOTES AND CHECKS.

1. Neither the fact that a check was dishonored when transferred, nor that presentment for payment has been delayed, discharges the drawer. If dishonored, any defense thereto against the payee will be available against his transferee; but no presumption arises that over-due or dishonored paper is invalid. If loss results to the drawer by delay in presentment, that is matter of defense. *Cowing v. Altman.* 167.
2. Under its charter (chap. 816, Laws of 1868) the People's Safe Deposit and Savings Institution had power to loan its capital and funds, but was restricted in its

- investments to such securities as are specified in its charter (§ 11); this does not include commercial paper. *Pratt v. Short.* 437
3. Accordingly *held*, that as the discounting of commercial paper is prohibited by statute (1 R. S., 712, §§ 3, 6), to any corporation not authorized by law so to do, and as paper so discounted is declared void, that a promissory note discounted by said corporation was void. *Id.*
 4. But, *held*, that the illegal action of its directors in thus investing its funds did not work a forfeiture of the money loaned, and that this might be recovered, although the security was void. *Id.*
 5. The history of the restraining acts given, and the authorities on the subject collated. *Id.*
 6. Defendant E., executed his bond and mortgage to secure the People's Safe Deposit and Savings Institution, for any indebtedness it had against the mortgagor, "upon or by reason of any promissory note, bill of exchange, overdraft, or otherwise." Subsequently said corporation loaned to the mortgagor various sums of money upon the discount of his notes, which expressed that the maker had deposited the bond and mortgage as collateral. In an action to foreclose the mortgage, *held*, that the notes were void, as the corporation had no power, under its charter, to loan money on personal security (chap. 816, Laws of 1868), and was prohibited by statute from discounting commercial paper (1 R. S., 712, §§ 3, 6); but that the corporation was authorized by its charter (§ 11) to invest in bonds and mortgages; that there was a loan which was within the condition of the mortgage; that the fact that the loan was made by way of discount; and upon the security of the notes, as well as of the mortgage, did not vitiate the latter; and that it was a valid security for the loan, and enforceable as such. *Pratt v. Eaton.* 449
 7. In an action upon a promissory note of \$2,400, it appeared that the note was indorsed by defendant W. for the accommodation of the makers, of which fact plaintiff had notice. The note was delivered by the makers to plaintiff's cashier, who indorsed it, and at their request procured it to be discounted by another bank, plaintiff receiving a compensation for procuring the discount. On, or prior to, the day the note fell due, the makers delivered to plaintiff another note, being one of several indorsed by W., and delivered to the makers to take up the note in suit, and other notes previously indorsed by him; plaintiff's cashier was directed to apply the proceeds to take up the paper so indorsed. It did not appear that this direction was revoked. The proceeds were credited to the makers. It did not appear that plaintiff, at that time, held any paper so indorsed by W., save the note in suit, which it had taken up. A few days after, the makers drew a check on, and delivered it to, plaintiff for \$2,731.62, payable to "notes, etc., or bearer." No money was paid the drawers thereon, and it did not appear that the proceeds of the note had been drawn out. *Held*, that the plain inference from the transaction was that the check was given to pay the note in suit, and that it was paid thereby; and that, in the absence of any proof rebutting this presumption, a finding of non-payment was error. *National Bank of Gloversville v. Wells.* 498
 8. *It seems*, that a national bank has no power to loan its credit and become an accommodation indorser of a promissory note. *Id.*
 9. Under the provision of the statute (1 R. S., 768, § 5), providing that promissory notes made payable to the order of the maker, or of a fictitious person, if negotiated by him, shall have the same validity, as against him and "all persons having knowledge of the facts, as if payable to bearer," the facts of which a person must have knowledge in order to give the note efficacy as against him, as if payable

to bearer, are simply that the note is payable to the order of the maker or of a fictitious person. *Irving Nat. Bank v. Alley.* 536

10. A note payable to the order of the maker, therefore, as against an accommodation indorser having knowledge of this fact, is to be considered as if payable to bearer; and is valid, although negotiated without the indorsement of the payee. *Id.*
11. *It seems*, that such an indorser, as against a *bona fide* holder, would be estopped from denying knowledge for the purpose of defeating the note; as the fact appears in the note, and he will not be permitted to say that he did not read or know the contents of the instrument signed by him. *Id.*
12. The "refusal" spoken of in the provision of the statute in reference to bills of exchange (1 R. S., 769, § 11), which declares that one upon whom a bill is drawn and delivered for acceptance, who destroys or refuses to deliver it, shall be deemed to have accepted it, is an affirmative act, or is made up of conduct tantamount to one; it is also a wilful or wrongful act. *Matteson v. Moulton.* 627
13. The mere retention, without a demand for a return, or a dissent to the retention, and with the permission of the owner, is not a refusal within the meaning of the statute. *Id.*
14. Where, therefore, it appeared that the drawee promised to pay the amount by the time or upon a contingency named, and that the payee, relying upon this, permitted the bill to remain in the hands of the former, and no demand or request for its return, and a denial or evasion thereof was proved, *held*, that the drawee was not chargeable as acceptor of the bill. *Id.*
15. Also, *held*, that the promise to pay was void under the statute of frauds (2 R. S., 135, § 2), as it was an oral promise to answer for the debt of another. *Id.*
16. The maker of a promissory note, in an action thereon by a transferee, cannot assail plaintiff's title on the ground that the transfer was made in fraud of the creditors of the payee; the transfer can only be assailed on that account by the creditors or some one representing them. *Sullivan v. Bonesteel.* 631

BONA FIDE HOLDER.

1. The possession of money vests the title in the holder, as to third persons dealing with him and receiving it in due course of business and in good faith, upon a consideration good as between the parties. *Stephens v. Bd. Edn. of B'klyn.* 183
2. The doctrine, that an antecedent debt is not such a consideration as will cut off the equities of third parties, in respect to negotiable securities obtained by fraud, has no application to money so obtained. *Id.*
3. Where a sale of goods has been induced by fraud on the part of the vendee, the vendor may reclaim and retake them from the possession of any one, except a transferee in good faith, and for a valuable consideration paid at the time of the transfer. *Stevens v. Brennan.* 254
4. A transfer by the fraudulent purchaser, as security for or in payment of a precedent debt, does not make the transferee a *bona fide* purchaser within the rule, so as to enable him to hold the goods against the original vendor. *Id.*
5. In a suit by such vendor to recover the goods from one claiming title under the fraudulent vendee, the burden is upon the latter of showing that he is a purchaser in good faith and for value. *Id.*
6. An assessment roll is akin to a judgment, and if an assessment is erroneously discharged of record, its lien cannot be restored so as to affect *bona fide* purchasers, or others standing in a similar rela-

tion, whose transactions were entered into in ignorance of the error and in reliance upon the truth of the record. *Curnen v. Mayor, etc.* 511

7. Under the provision of the Revised Statutes (1 R. S., 749, § 3), which provides that the title of a *bona fide* purchaser, for a valuable consideration, from the heirs-at-law of a person who died seized of real estate, shall not be defeated or impaired by a devise by such person of the real estate so purchased, unless the will containing the devise shall have been duly proved or recorded within four years after the death of the testator, except, among other things, where it appears that the will has been concealed by the heirs or some one of them, the exception does not apply where the devisees or some one of them have knowledge and possession of the will, and it is taken from such possession clandestinely by an heir and secreted or destroyed; it only applies to a concealment, which leaves the devisees in ignorance of their rights under the will, and deprives them of knowledge of its existence. *Cole v. Gourlay*, 527

— *Accommodation indorser of note payable to order of payee and negotiated by him without indorsement is, as against bona fide holder, estopped from denying knowledge of form of note.*

See I. N. Bank v. Alley. 536

BONDS.

See TOWN BONDING.

BRIDGES.

See HIGHWAYS.

BROOKLYN (CITY OF).

1. The provisions of the act of 1872, "to regulate elections in the city of Brooklyn" (§§ 12, 13, chap. 575, Laws of 1872), providing for preserving the ballots, are germane to the subject expressed in the

title; their incorporation in the act, therefore, does not render it violative of the provision of the State constitution, declaring that no private or local bill shall embrace more than one subject; and that shall be expressed in the title. (Art. 3, § 16.) *People ex rel. Dailey v. Livingston.* 279

2. The provision of said act (§ 13), requiring the board of canvassers to deposit the ballot-boxes in the department of police, does not require the canvassers personally to carry the boxes to the police department, nor does it require the boxes to be deposited at police headquarters; a delivery of the boxes by the canvassers to police officers assigned for that purpose, and a deposit of said boxes by such officers in the precinct station-houses, is a substantial compliance with the provision. *Id.*
3. The provision requiring, that after the canvass is completed and the ballots returned to the boxes, said boxes shall be "securely sealed up by the canvassers," contemplates that the boxes shall be so sealed that they cannot be opened without breaking the sealing. *Id.*
4. Where the inspectors sealed the apertures to the boxes, through which the ballots were inserted, and the canvassers did not remove these seals, but delivered the boxes to the police department without further sealing, *held*, that this was not a compliance with the act. *Id.*
5. But, *held*, that this provision was directory only, and where it is proved satisfactorily that the boxes had been kept "undisturbed and inviolate," the omission of the canvassers to seal up the boxes, as contemplated, does not render the ballots inadmissible as evidence. *Id.*
6. The burden of proof, however, is upon a party producing the ballot-boxes to show to the satisfaction of a jury that they have been kept undisturbed and inviolate; it is not sufficient that a mere probability of security is proved, the

fact must be shown with a reasonable degree of certainty. *Id.*

7. The use of the ballots so preserved, as evidence, is not limited to cases of city officers merely, they are admissible as well in cases of other officers voted for in the city of Brooklyn. *Id.*

8. In an action of *quo warranto* wherein the ballot-boxes were produced and the ballots received in evidence to impeach the accuracy of the returns of the inspectors of election, and wherein it appeared that the boxes had not been sealed up by the canvassers, and had been kept insecurely, so that the question whether the ballots were the identical ones voted was one of fact for the jury, the court instructed the jury, in substance, that to justify their rejection, it must appear affirmatively by direct evidence, or from circumstances, that the boxes had been tampered with, *held*, error; and that the error was fatal to the judgment. *Id.*

— *When action not maintainable to set aside assessment or sale thereunder, also effect of former adjudication as a bar to such action.*

See Guest v. City of B. (Mem.) 624

BUFFALO (CITY OF).

1. The act entitled, "an act authorizing the common council of the city of Buffalo to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore or margin of Lake Erie" (chap. 547, Laws of 1864), authorized the taking of a fee in lands required for the purpose specified; and under proceedings for that purpose taken as prescribed by the act which gave to the city all the interest authorized by the act, it acquired an absolute fee. *Sweet v. Buffalo, N. Y. and Phil. R. R. Co.* 294
2. The fact that the particular purpose for which the land was to be taken is expressed in the title and in the act does not qualify the

estate taken; the purpose so declared simply regulates and defines the use for which the land shall be held. *Id.*

BURDEN OF PROOF.

In a suit by a vendor to recover goods from one claiming title under a fraudulent vendee, the burden is upon the latter of showing that he is a purchaser in good faith and for value. *Stevens v. Brennan.* 254

— *Surrender by sheriff of property attached without calling a sheriff's jury throws upon him burden of showing that property was not subject to attachment.*

See Mumper v. Rushmore. 19

— *When burden of proof is upon party producing ballot-boxes and ballots in city of Brooklyn as evidence under the act chapter 575, Laws of 1872, to show that the boxes have been kept undisturbed and inviolate.*

See People ex rel. v. Livingston. 279

CANALS.

1. The canal commissioners having entered into a contract with M. to do certain work, which was of public necessity, and M. having refused to go on with the work because of the refusal of the canal auditor to audit and allow certificates of the commissioners, on the ground that there was no unexpended appropriation to pay them, the relator, at the request of the commissioners, for the purpose of expediting the work, advanced the money required to complete it, in reliance upon a future appropriation by the Legislature, and the certificates were assigned to him. The acts of the commissioners in respect to the work were communicated to the Legislature, from time to time, in the official reports of the commissioners, which stated the amounts expended and the purposes of the expenditure in accordance with the facts. In 1875 a budget was made up in the auditor's office of out-standing cer-

tificates, issued for work done on the canal, and furnished to the Legislature when engaged in making an appropriation to pay the same; in which budget the certificates so held by relator were specifically described and included, and an appropriation was made to the precise amount of the budget (§ 1, chap. 233, Laws of 1875). In proceedings to compel the auditor by mandamus to draw his warrant for the amount of the certificates; *held*, that the facts authorized a finding, that the act making an appropriation was passed with full knowledge on the part of the Legislature, and with the intent to provide specifically for the payment of said certificates; that the fact that the appropriation was made for this purpose having been established, the questions of ratification or knowledge of the Legislature of the facts relating to the contract, and of the validity of the contract were unimportant; and that the relator was entitled to the relief sought. *People ex rel. Sage v. Schuyler.* 189

2. Also *held*, that said appropriation was not repealed by the repealing clause in the act of 1876 (§ 1, chap. 425, Laws of 1876), providing "for the completion or cancellation of all pending contracts" for new work upon or extraordinary repairs of the canals. *Id.*

CANCELLATION OF WRITTEN INSTRUMENT.

1. An action to procure the cancellation of a written instrument cannot be maintained, unless some special circumstance exists establishing the necessity of a resort to equity, to prevent an injury, which might be irreparable and which equity alone is competent to avert; it is not sufficient that a defense exists as against the instrument, or that evidence may be lost. *Globe Mut. Life Ins. Co. v. Reals.* 202
2. In an action to procure the cancellation of a policy of life insurance, the complaint alleged that the policy was obtained by fraud

and conspiracy between plaintiff's agent and the insured; that the premium was not paid in cash, as required by the policy, but by the note of the insured, and was delivered to the latter when he was sick, of which sickness the insured died. The complaint also averred that plaintiff feared the holder of the policy would commence an action thereon, and by collusion with said agent obtain an appearance on its behalf, and from failure to answer, or to duly defend the action, obtain a judgment without plaintiff's knowledge, thus preventing plaintiff from presenting its defense, or that defendants would delay bringing an action until the evidence of fraud and conspiracy was lost. The referee found that there was no fraud; the other facts were found substantially as alleged in the complaint. *Held*, that the complaint was properly dismissed. *Id.*

CASES DISTINGUISHED, LIMITED, QUESTIONED, REVERSED AND DISAPPROVED.

Gold v. Whitcomb (14 Pick., 188), distinguished and limited. *Green v. Disbrow.* 11

Adams v. Carroll (55 Penn., 209), distinguished and limited. *Green v. Disbrow.* 12

Lowber v. Smith (7 Barr. [Penn.], 331), questioned. *Green v. Disbrow.* 12

Peck v. N. Y. and L. [U. S.] M. S. S. Co. (3 Bosw., 622), distinguished and limited. *Green v. Disbrow.* 13

Westbrook v. Gleason (14 Hun, 245), reversed. *Westbrook v. Gleason.* 23

Thompson v. Loan Commissioners (16 Hun, 86), reversed. *Thompson v. Loan Commissioners.* 54

Thompson v. Burhans (15 Hun, 580), reversed. *Thompson v. Burhans.* 93

- Jackson v. Lunn* (3 John. Cas., 109), distinguished. *Thompson v. Burhans*. 101
- Woods v. Banks* (14 N. H., 101), disapproved. *Thompson v. Burhans*. 101
- Brown v. Knapp* (17 Hun, 160), reversed, but not upon grounds there discussed. *Brown v. Knapp*. 100
- King v. West* (10 How. Pr., 333), questioned. *Bergen v. Carman*. 152
- Johnson v. Conger* (14 Abb. Pr., 195), distinguished. *Druce v. Fulton Nat. Bk.* 165
- Pordage v. Cole* (1 Williams' Saunders, 819), distinguished. *Bruce v. Fulton Nat. Bk.* 165
- Butler v. Thompson* (2 Otto [92 U. S.], 412), distinguished. *Bruce v. Fulton Nat. Bk.* 166
- Caussidiere v. Beers* (2 Keyes, 198), distinguished. *Stevens v. Bd. of Edm.* 188
- People ex rel. Sage v. Schuyler* (17 Hun, 106), reversed. *People ex rel. Sage v. Schuyler*. 189
- People ex rel. Wasson v. Schuyler* (69 N. Y., 242), distinguished. *People ex rel. Sage v. Schuyler*. 202
- Richmond v. Nia. F. Ins. Co.* (15 Hun, 248), reversed. *Richmond v. Nia. F. Ins. Co.* 230
- In re Harmony F. and M. Ins. Co.* (45 N. Y., 310), limited and distinguished. *In re People ex rel. Atty.-Genl. v. Secur. L. Ins. and An. Co.* 272
- Conklin v. Bauer* (62 N. Y., 620), distinguished. *Burkitt v. Harper*. 276
- Knapp v. Brown* (45 N. Y., 207), distinguished. *Burkitt v. Harper*. 277
- Muldoon v. Pitt* (54 N. Y., 269), distinguished. *Burkitt v. Harper*. 277
- People ex rel. Dailey v. Livingston* (13 Hun, 59), reversed. *People ex rel. Dailey v. Livingston*. 279
- Bennett v. Garlock* (10 Hun, 228), reversed. *Bennett v. Garlock*. 302
- Nichol v. Walworth* (4 Denio, 385), distinguished. *Bennett v. Garlock*. 318
- Norton v. Norton* (3 Sand., 196), distinguished. *Bennett v. Garlock*. 319
- Chamberlin v. Chamberlin* (43 N. Y., 424), distinguished. *Kerr v. Dougherty*. 343
- Dawley v. Brown* (9 Hun, 461), reversed. *Dawley v. Brown*. 350
- Boughton v. Otis* (21 N. Y., 264), distinguished. *Losee v. Bullard*. 406
- Sanborn v. Lefferts* (53 N. Y., 179), distinguished. *Losee v. Bullard*. 408
- Gladius v. Black*, (57 N. Y., 563; 50 id., 145), distinguished. *Weyer v. Beach*. 412
- Church v. Howard* (17 Hun, 5), reversed. *Church v. Howard*. 415
- Cancemi v. The People* (18 Hun, 128), distinguished. *Pierson v. People*. 429
- Pratt v. Eaton* (18 Hun, 208), reversed. *Pratt v. Eaton*. 449
- Un. Hotel Co. v. Hersee* (15 Hun, 371), reversed. *Un. Hotel Co. v. Hersee*. 454
- McCall v. N. Y. C. R. R. Co.* (54 N. Y., 642), distinguished. *Stackus v. N. Y. C. and H. R. R. Co.* 468
- Waffle v. N. Y. C. and H. R. R. Co.* (53 N. Y., 11), distinguished. *Noonan v. City of Albany*. 476
- Nat. Bk. of Gloversville v. Wells* (15 Hun, 51), reversed. *Nat. Bk. of Gloversville v. Wells*. 498

- Xenos v. Wickham* (L. R. [3 H. of L.], 296), distinguished. *Dietz v. Parish.* 525
- Geston v. People* (4 Lans., 487), distinguished. *Eighmy v. People.* 557
- Bonner v. McPhail* (1 Barb., 107), distinguished. *Eighmy v. People.* 557
- Andrews v. Long* (19 Hun, 303), reversed. *Andrews v. Long.* 573
- People ex rel. Mayor, etc., v. Nichols* (18 Hun, 530), reversed. *People ex rel. Mayor, etc., v. Nichols.* 532
- Norris v. Thompson's Ex'rs* (19 N. J., 307), distinguished. *Power v. Cassidy.* 611
- Stubbs v. Sargon* (3 M. & C., 507; 2 Keene, 255), distinguished. *Power v. Cassidy.* 611
- Morice v. Bishop of Durham* (10 Ves., 522), distinguished. *Power v. Cassidy.* 612
- Ommanny v. Butcher* (1 T. & R., 260), distinguished. *Power v. Cassidy.* 612

CAUSE OF ACTION.

1. Where a legacy is directed to be paid by the executor, who is a devisee of real estate, such estate is charged with the payment of the legacy; and the devisee, upon accepting the devise, becomes personally bound to pay the legacy; and this, although the land devised to him proves to be less in value than the amount of the legacy. *Brown v. Knapp,* 136
2. *It seems,* that payment of such a legacy may be enforced by a suit in equity against the real estate, or by an action directly against the devisee upon the promise to pay implied by the acceptance of the devise. *Id.*
3. Where the bonds of a town have been issued to a railroad corporation, in payment for stock, by commissioners appointed under and by a judgment, void for want of jurisdiction, rendered in proceed-

ings under the act authorizing "municipal corporations to aid in the construction of railroads" (chap. 907, Laws of 1869), an equitable action is maintainable, under the act of 1872, for the protection of tax-payers, etc. (chap. 161, Laws of 1872), at the suit of a tax-payer of the town, to restrain the negotiation or payment of the bonds, and to compel their cancellation. *Metzger v. At. and Ar. R. R. Co.* 171

4. One G., who was a member of the board, defendant herein, as attorney for it received \$3,000.84 of its money, which he wrongfully appropriated to his own use; he subsequently procured from plaintiff on a forged mortgage \$4,129.34, which he deposited in a bank to his credit, and on the same day drew his check on said bank to defendant's order for the amount so appropriated, and delivered the same to defendant, who received it, without notice or knowledge of the fraud perpetrated upon plaintiff, and gave G. credit therefor; the check was paid and the money received thereon used by defendant. In an action to recover the amount so received by defendant from G., *hell,* that defendant having received the money in good faith, and in the ordinary course of business, for a valuable consideration, was not liable. *Stephens v. B.J. Edn. of Bklyn.* 183
5. *It seems,* that while the money remained on deposit in the bank, plaintiff could have compelled the bank to restore it, but having paid it out, without notice of any defect in the title of G., it was thereafter protected. *Id.*
6. An action to procure the cancellation of a written instrument cannot be maintained, unless some special circumstance exists establishing the necessity of a resort to equity, to prevent an injury, which might be irreparable and which equity alone is competent to avert; it is not sufficient that a defense exists as against the instrument, or that evidence may be lost. *Globe Mut. L. Ins. Co. v. Reals.* 202

7. Where a prohibitory statute points out the consequences of its violation, and it appears to have been the legislative intent to exclude any other penalty or forfeiture than such as is declared in the statute, no other will be enforced; and an action may be maintained upon the transaction, of which the prohibited act was a part, if it can be done without sanctioning the illegality. *Pratt v. Short.* 437

— *When action maintainable on contract of insane person.*

See M. L. Ins. Co. v. Hunt. 541

CERTIORARI.

1. The Supreme Court may, upon application of the prosecution, issue a writ of certiorari, to remove an indictment into that court from the Oyer and Terminer. *Jones v. People.* 45
2. As to whether a certiorari may be brought for that purpose without the consent and in spite of the authority of the Supreme Court, *quære.* *Id.*
3. It is not necessary to give notice of application for the writ. *Id.*
4. It is discretionary with the Supreme Court after having obtained jurisdiction of the case either to quash the writ upon cause shown, to remand the case to the Oyer and Terminer, or to proceed to its disposition as in other cases pending before it. *Id.*
5. Accordingly *held*, that an order of the Supreme Court refusing to quash such a writ was not reviewable here. *Id.*
6. The power to remove certain city officers "for cause," and after opportunity to be heard, given to the mayor by the charter of the city of New York of 1873 (§ 25, chap. 335, Laws of 1873), can only be exercised upon just and reasonable grounds, and after notice to the person charged. The proceeding must be instituted upon specific charges, sufficient in their nature to warrant the removal,

which, unless admitted, must be proved; the defendant may cross-examine the witnesses to support the charges, call others in his defense, and in all the steps of the proceedings is entitled to be represented by counsel. *People ex rel. Mayor, etc. v. Nichols.* 582

7. The proceeding, therefore, being judicial in its character is subject to review by a writ of certiorari issued out of the Supreme Court. *Id.*
8. A motion for judgment upon the return to a writ of certiorari in such proceedings presents a question of law only, and comes within the class of non-enumerated motions as defined by Supreme Court rule thirty-eight. *Id.*
9. But if otherwise it is within the jurisdiction of the court to hear it at any Special Term, and upon such notice as shall be prescribed. *Id.*
10. A notice of less than eight days may be prescribed (Code of Civil Procedure, § 700, S. C. rule 37), by order to show cause. *Id.*
11. The power to shorten notice is not affected by the rule of the Supreme Court (rule 44), providing that a case on certiorari may be brought to a hearing upon the usual notice of argument; the rule is binding only so far as it is consistent with the Code (§ 17). *Id.*
12. *It seems*, that the exercise of this power is subject to review whenever an order to show cause at Special Term is granted. *Id.*
13. It is not improper to bring on the certiorari for a hearing at the Special Term at which the order to show cause is made returnable. *Id.*
14. The Mayor of the City of New York having removed the defendant N. from the office of commissioner of police, a writ of certiorari was, upon his application, duly allowed and made returnable at a Special Term designated "for non-enumerated motions and cham-

ber business," on the first Monday of September, 1879. A return to the writ was filed September fifteenth; on the sixteenth, the justice assigned to hold that term made an order requiring the mayor to show cause at the Special Term, to be held on September twenty-second, why N. should not have judgment on the return, vacating the judgment of the mayor; the order provided that service on September seventeenth, would be sufficient. Whereupon the General Term granted an order directing that a writ of prohibition issue prohibiting the Special Terms appointed to be held in the city of New York for non-enumerated motions and chamber business, and the justices appointed to preside thereat, from proceeding to entertain any motion or application for any judgment or order affecting the proceedings of the Mayor. On appeal from the order, *held*, that there was no violation of the provisions of any statute or unlawful exercise of jurisdiction by the justice holding the Special Term; and that the order appealed from was erroneous. *Id.*

15. Costs of appeal in proceedings by common law certiorari are not allowable; whether the proceedings come here upon appeal from a judgment, or from an order superseding the writ. *People ex rel. Smith v. Village of Nelliston.* 638

CHAMPERTY AND MAINTENANCE.

1. To avoid a deed for champerty under the statute (1 R. S., 739, § 147), actual, not constructive adverse possession in another is required. *Dawley v. Brown.* 390
2. It must also appear that at the time of the delivery of the deeds the lands were in the actual possession of a person claiming "under a title adverse to the grantor." It is not enough that he claims title; he must claim under some specific title, which must be disclosed, so that the court may see that it is adverse to that of the grantor in the deed assailed. *Id.*

3. In an action of ejectment plaintiff claimed under a devise from his father, a deed from himself to C., in March, 1857, and a reconveyance from C. in July 16, 1869. It appeared that a former action was commenced by plaintiff, after his deed to C. and before the reconveyance, against defendant, one F. and others. What the original complaint was did not appear. The default of defendant and F. was entered therein July 6, 1869, and by an *ex parte* order the summons and complaint were amended by striking out the names of all the defendants therein except the defendant here and F., and by making the complaint one in ejectment, for lands including the premises claimed in this action, and judgment was thereupon entered against defendant and F. for the recovery of the said lands. A writ of possession was issued, and on the same day plaintiff went with the sheriff upon the lands, to be put in possession, when defendant and two other persons in possession of part of the lands, attorned in writing to plaintiff, and the sheriff made return that he had delivered full possession to plaintiff, which return was filed July fourteenth. On July twenty-sixth, an order was made vacating and setting aside said judgment, and re-instating defendant and F. in possession. *Held*, that the deed from C. to plaintiff was not void under the statute aforesaid: 1st. As prior to its date plaintiff had been put in possession and defendant had attorned to him, which attornment was then in force; the subsequent vacation of the judgment did not relate back so as to make the deed void on the ground that defendant was then holding adversely. 2d. Because it did not appear that defendant claimed under any specific title adverse to that of C. *Id.*

CLOUD ON TITLE.

— Action to set aside an assessment or a sale thereunder, as a cloud on title, on ground of irregularity, not maintainable. *See Guest v. City of B. (Mem.)* 624

CODE OF PROCEDURE.

- § 93. *Green v. Disbrow*, 1.
 § 122. *Paoer v. Cassidy*, 622.
 § 373. *Cornes v. Wilkin*, 123.
 § 399. { *Stevens v. Brennan*, 251.
 Merriitt v. Campbell, 623.

CODE OF CIVIL PROCEDURE.

- § 17. *People ex rel. v. Nichols*, 502.
 § 514. *Fleischmann v. Bennett*, 579.
 § 761. *Uline v. N. Y. C. and H. R. R. Co.* 175
 § 780. *People ex rel. v. Mayor*, 502.
 § 829. *Church v. Howard*, 415.
 § 834. *Pierson v. People*, 421.
 § 892, 941. *Uline v. N. Y. C. and H. R. R. Co.*, 175.
 § 974. *Cook v. Jenkins*, 573.
 § 999. *S. O. Co. v. A. I. Co.*, 506.
 § 1059. *Pierson v. People*, 424.
 § 1279. *Kennedy v. The Mayor*, 501.
 § 1338. *Weyer v. Deach*, 403.
 § 1342. *Andrews v. Long*, 573.
 § 1347, 1343. *Uline v. N. Y. C. and H. R. R. Co.*, 175.

COMMISSION (TO TAKE TESTIMONY).

1. *It seems*, that while a judge, in settling interrogatories to be annexed to a commission to take testimony, is required to allow "any question, pertinent to the issue" (Code of Civil Procedure, § 802), he has authority to disallow questions not pertinent, and hence to determine whether a question is pertinent or not. *Uline v. N. Y. C. and H. R. R. Co.* 175
2. The power to exclude questions, however, should be sparingly exercised. *Id.*
3. The judge in such case has not the discretion which the court has on trial as to the extent to which he will permit a cross-examination, for the purpose of merely testing the credit of the witness, and upon matters collateral to the main issue; he must insert all pertinent questions. *Id.*
4. The decision of the judge in settling the interrogatories is an order (Code of Civil Procedure, §

767); if it disallows a pertinent question, it affects a substantial right; and is therefore appealable. (Code, §§ 1347, 1348). *Id.*

5. As to whether the party has a remedy in such case by mandamus, to compel the allowance of the question, *quære*. *Id.*

6. An appeal does not lie from an order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial. (Code, § 911.) *Id.*

7. In an action to recover damages for injuries alleged to have resulted from defendant's negligence, a release was set up as a defense; this the plaintiff claimed was a forgery. A commission was issued on behalf of defendant, to take the testimony of the person who plaintiff alleged forged the release, as to the alleged settlement. Plaintiff after a cross-interrogatory calling for the salary paid to the witness, proposed others, asking the amount of the witness' expenses per annum, whether he left the place by day or night, by whom he was accompanied, and where he stopped; also, as to the amount of the debts he left unpaid; whether before he left he purchased an India shawl, and at what price, and whether he borrowed money of certain persons specified. These cross interrogatories were disallowed; *held*, error. *Id.*

COMMISSIONERS OF HIGHWAYS.

See HIGHWAYS.

CONFLICT OF LAWS.

— *In action to enforce liability of devisee of real estate to pay a legacy charged thereon, where testator and devisee were residents of another State, rate of interest of that State controls.*

See *Brown v. Knapp*. 138

— *Bequest to Pennsylvania corporation, in will of resident of this State, when void.*
See Kert v. Dougherty. 327

CONSIDERATION.

— *Seal presumptive evidence of; and when mortgagor estopped from questioning it.*
See Best v. Theil 15

— *Sufficiency of, to sustain promise.*
See Emery v. Wilson. 78

CONSTITUTION.

The Supreme Court having, under the State constitution (art. 6, § 6), general jurisdiction of law and equity, its jurisdiction cannot be limited either by the Legislature, or by any power conferred by it upon the court itself. *People ex rel. Mayor, etc., v. Nichols.* 582

CONSTITUTIONAL LAW.

1. The provisions of the act of 1872, "to regulate elections in the city of Brooklyn" (§§ 12, 13, chap. 575, Laws of 1872), providing for preserving the ballots, are germane to the subject expressed in the title; their incorporation in the act, therefore, does not render it violative of the provision of the State constitution, declaring that no private or local bill shall embrace more than one subject; and that shall be expressed in the title. (Art. 3, § 13.) *People ex rel. Dailey v. Livingston.* 279
2. It is within the power of the Legislature, in authorizing land to be condemned for a public use which may be permanent, to determine what estate therein shall be taken, and to authorize the taking of a fee or any less estate in its discretion. *Sweet v. Buf. N. Y. and Phila. R. R. Co.* 293
3. The act entitled, "an act authorizing the common council of the city of Buffalo to lay out a public

ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore or margin of Lake Erie" (chap. 547, Laws of 1864), does not conflict with the provision of the State constitution (art. 3, § 16) declaring that a private or local act shall include but one subject, which shall be expressed in its title. *Id.*

CONSTRUCTIVE POSSESSION.

See ADVERSE POSSESSION

CONTEMPT.

1. An order punishing for contempt, in violating an injunction, can only be reviewed, upon the merits or for alleged legal error, on appeal from the order. *Watrous v. Kearney.* 406
2. It is within the discretion of the court whether to open or vacate the order on motion, and the exercise of this discretion cannot be reviewed here. *Id.*
3. Where a party has been brought into court on attachment, in proceedings to punish for contempt, he may be represented by attorney in the subsequent proceedings. *Id.*
4. An order punishing defendants for contempt was granted by default. On motion to vacate the order, it was alleged, in the moving papers, that the attorneys who appeared for the defendants in the proceedings had no authority. The attorney, who appeared on return of the attachment, made affidavit that he was authorized; the defendants were also personally present; the same attorney appeared before the referee, to whom it was referred, to take proofs. Notice of motion for final order was served on, and service admitted by, attorneys who had appeared for defendants in the action, and who had also admitted service of the referee's report. *Held*, that as the attorneys thus undertook to represent defendants, the mere allegation of want

of authority so to do did not invalidate the order. 77.

CONTRACT.

1. E. plaintiff's testator, defendant and one S. entered into a copartnership in 1865, "for so long a time as they shall mutually agree," E. to receive one-tenth, defendant four-tenths and S. five-tenths of the net profits. For the year 1872, E. received a greater proportion, defendant a less, S. the same. On January 1, 1873, defendant executed an instrument by which he agreed to pay E. "four and three-eighths per cent of the net ascertained profits" of the firm "during the year 1873." E. remained in the firm, receiving during the year the share of profits stated in the original agreement. In an action upon the instrument, *held*, that the facts authorized an inference that E. consented to continue the copartnership, in consequence of the promise of defendant; and that this was a sufficient consideration for the promise. *Emery v. Wilson.* 78

2. By the articles of copartnership it was provided that quarterly accounts should be taken and settled between "the copartners, to the intent that it may thereby appear what are the net profits." *Held*, that it was proper to take the quarterly statements so taken, and entered upon the books for the year 1873, as the "net ascertained profits" upon which the percentage was to be paid by defendant; and that it was no error for the referee to refuse to deduct from the profits so ascertained the depreciation in value of the firm property. *Id.*

3. The rule of law that, from a request to perform services, an implied promise arises to pay what the services are worth, does not apply where the services are rendered by one in the employ of the person making the request; in such case the implication is that the services were rendered under the contract of employment, particularly if the services are of the

same character as those embraced in that contract. *Ross v. Harding.* 84

4. As to whether a contract may be made by a person during his life, for the preservation and safety of his property after his death, and until administrators are appointed, *quære.* *Id.*
5. If such a contract can be so made with an employe who has had similar services to perform during the life of the employer, unless the parties stipulate for a different compensation, it will be presumed that the same rate of compensation paid before the death of the employer continues thereafter. *Id.*
6. While it is the province of the courts to construe contracts, yet where the meaning of a contract is obscure and depends upon facts *aliunde*, in connection with the written language, the question of construction may be one of fact for the jury. *First Nat. Bk. of Springfield v. Dana.* 103
7. Defendant was the editor of a newspaper owned by a corporation, a portion of the stock of which he held. W., who was plaintiff's president, owning a majority of its stock, was also a stockholder in said corporation. Defendant was advised by the publisher of the paper, who had been to see W. and other stockholders, that they had concluded to levy an assessment upon the stock, and that they had agreed to furnish the money for his share upon pledge of his stock. It was represented to defendant that W. had paid his subscription to the stock in full, that there was to be an additional assessment upon all the stock, and that W. was to pay his share. The note in suit was thereupon made, and delivered to the publisher. W. had not paid his assessment, nor had he paid in full for his stock. At a subsequent meeting of the stockholders of the newspaper company, it was agreed that defendant should withdraw from it and give up his stock, the stockholders agreeing to assume payment of the note; and defendant there-

upon surrendered his stock. Upon being advised that a claim was made against him, defendant wrote to plaintiff, stating the facts, and that if sued he would be obliged to sue the company and its stockholders. Plaintiff's cashier thereafter wrote defendant, proposing that if defendant would sue the newspaper company for the performance of the contract to pay the note, it would pay one-half the cost, adding that if the proposition suits it will avoid the necessity of a suit upon the note. An agreement was entered into upon the basis of this letter. Defendant brought an action against said company, obtained judgment, and upon return of execution unsatisfied brought suit against the stockholders, which was pending when this action was commenced. The court directed a verdict for plaintiff; *held*, error; that if the letter of plaintiff's cashier stood alone, it was a question whether the contract was not satisfied by bringing the action and obtaining the judgment against the company; if all the letters were to be considered it was not clear that a suit against the stockholders was not a part of the arrangement; and that this was a question for the jury. *Id.*

8. When a highway bridge in the town of G. was carried away by a flood shortly prior to the town meeting of 1873, *held*, that the commissioners of highways of the town, with the consent of the board of town auditors, were authorized to enter into a contract for the rebuilding of the bridge, under the provisions of the act providing for "the speedy construction and repair of roads and bridges," etc. (§ 1, chap. 103, Laws of 1853, as amended by chap. 442, Laws of 1865), which authorizes the commissioners of highways of a town, with such consent, where a bridge has been damaged or destroyed after a town meeting, to cause the same to be immediately repaired or rebuilt. *Boots v. Washburn.* 207

9. Also, *held*, that the commissioners were authorized to contract to pay

for the bridge upon the completion thereof, although they had no money in their hands for that purpose. *Id.*

10. In an action upon such a contract, it appeared that the consent of the board of town auditors to the rebuilding of the bridge was given at its regular annual meeting, when all the members of the board were present; it did not appear whether the consent was in writing or not. *Held*, that, if requisite, it would be assumed that a record of the consent was properly made. *Id.*

11. There were three commissioners of highways of the town, all of whom united in the determination to rebuild the bridge, and in the application to the board of auditors; also in the agreement upon the plan, and that the work should be by contract, the letting to be advertised. At the time the contract was let and entered into, one of the commissioners was absent, he not having received actual notice in time to attend; his name was signed to the contract by one of the other commissioners, who previously, by his consent, had signed his name to the advertisement; he afterwards, with knowledge of the facts, acted with the other commissioners in reference to the bridge without any objection, and never questioned the validity of the contract. *Held*, that the contract was to be treated as the valid contract of the three commissioners. *Id.*

12. Plaintiffs entered into a contract with S. & G., by which the former agreed to malt for the latter 25,000 bushels of barley from October 1, 1875, to June 1, 1876, at a price specified. Plaintiffs were to purchase the barley, and ship the malt when directed by S. & G., who were to have the increase. S. & G. agreed to accept plaintiffs' drafts "in payment for the purchase of the barley," or to furnish satisfactory notes. At the close of each month plaintiffs were to furnish a statement of the amount malted, and on presenta-

tion S. & G. agreed to pay the price for malting. S. & G. also agreed to pay interest, exchange and insurance on the barley and malt from the time the barley was paid for by plaintiffs until the malt was delivered. Plaintiffs were authorized to retain and hold as security, after June first, a sufficient amount of the malt to pay any notes or drafts then unpaid. In an action for malt manufactured under the contract, but not delivered or paid for, which had been levied upon by defendant as sheriff, under and by virtue of an execution against S. & G., *held*, that the legal title in the malt was in the plaintiffs until paid for, and that S. & G. had no leviable interest therein. *Tut-hill v. Bogart.* 215

13. The parties negotiated for the purchase by defendant, and sale by plaintiff, of certain premises; they agreed upon the price, and a contract was signed in duplicate, to which P. attached his name as a witness. While the papers lay upon the table in the possession of P., defendant inquired as to the papers in respect to the title; plaintiff replied that he had none; defendant then suggested that before proceeding further the matter should be submitted to his counsel for approval, which was assented to by plaintiff. The parties went to the office of that counsel, and he being absent, the papers, with defendant's check for the sum to be paid down, were left with a clerk, with directions to deliver them if the counsel approved; he did not approve, but rejected the title as defective. Before said counsel had given his opinion plaintiff obtained one of the duplicates from the clerk and procured an acknowledgment thereof on the oath of the subscribing witness. In an action for specific performance, *held*, that the facts justified a finding that no contract was concluded; that all the acts of the parties were to be regarded as parts of one transaction, which was never consummated, as there was to be no contract until delivery, and no delivery until approval. *Dietz v. Farish.* 520

14. Also, *held*, that plaintiff acquired no advantage by procuring possession of the contract, or the subsequent proof thereof. *Id.*

15. *It seems*, that an obligation entered into by an insane person to repay money loaned, of which he had the benefit, is valid where the lender acted in good faith, without fraud or unfairness, and without knowledge of the insanity or notice or information calling for inquiry; and an action is maintainable thereon. *Mut. Life Ins. Co. v. Hunt.* 541

See COVENANTS.

CORPORATIONS.

1. The right of a corporation to take by devise or bequest is subject to the general laws of the State in regard thereto, passed subsequent to its incorporation. *Kerr v. Dougherty.* 328.

2. Where by the charter of a corporation the right is reserved to the Legislature to alter or repeal it, a subscriber to its capital stock is not discharged from his subscription by a subsequent amendment to the charter, but will be regarded as having consented to the change. *Union Hotel Co. v. Hersee.* 454

3. By plaintiff's charter (chap. 433, Laws of 1871) it was provided that the franchises thereby granted should become null and void unless it should begin the construction of a hotel within two years after the passage of the act; it was also made "subject to the liabilities and restrictions contained in certain provisions of the Revised Statutes," among others to the provision (1 R. S., c. 60, § 8) declaring that the charter of every corporation thereafter "granted by the Legislature shall be subject to alteration, suspension or repeal, in the discretion of the Legislature." Defendant subscribed for fifty shares of the capital stock. Subsequently, but before the expiration of the two years, the charter was amended (chap. 123, Laws of 1873) by extending the time for beginning the construction of the hotel five years. The work

of construction was not commenced within the two years, and soon after defendant gave notice to plaintiff that he withdrew his subscription. In an action upon the subscription, *held*, that the said provision of the Revised Statutes was to be considered as incorporated in the charter, and as part of defendant's contract; and that the subscription was not defeated by the amendment. *Id.*

4. Defendant's subscription was made on the condition that "the sum of \$200,000 be subscribed by the citizens of Buffalo." The requisite amount was subscribed; some of the subscriptions were in firm names written by one partner; one was in the name of a corporation; it appeared that this was made by authority of the directors of the corporation, and with the assent of all the stockholders. Upon these subscriptions payments were made in compliance with calls made upon the subscribers. *Held*, that the evidence established *prima facie* the validity of these subscriptions; that, in any event, the payment upon each was a ratification thereof. *Id.*

5. One of the subscribers had, at the time of the subscription, his domicile in Batavia, but boarded in Buffalo, was engaged in business and spent nearly all of his time there. *Held*, that he was a citizen of Buffalo within the meaning of the subscription paper. *Id.*

6. Another subscription was in the name of "B. & S. M. Spencer." B. Spencer, who signed, was a resident of Buffalo. *Held*, that the subscription was within the terms of the contract; and this, although there was no such firm, or B., signed without authority, as in either event he would be liable as upon his individual subscription. *Id.*

See BENEVOLENT, ETC., ASSOCIATIONS.
INSURANCE (FIRE).
INSURANCE (LIFE).
MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.
RELIGIOUS CORPORATIONS.

COSTS.

1. Where an order of General Term, reversing an order of Special Term, as to the disposition of surplus moneys in a foreclosure suit, and sending the case back to the referee, imposes costs absolutely, in this respect it is a final decision, and an appeal to this court can be taken. *Bergen v. Carman.* 146

2. Costs of appeal in proceedings by common law certiorari are not allowable; whether the proceedings come here upon appeal from a judgment, or from an order superseding the writ. *People ex rel. Smith v. Village of Nelliston.* 638

COUNTER-CLAIMS.

1. *It seems*, that the provision of the Code of Civil Procedure (§ 974), in reference to the mode of trial when defendant interposes a counter-claim, and demands an affirmative judgment, and an issue of fact is joined thereon, applies only when the counter-claim sets up matter for which a separate action might be maintained. *Cook v. Jenkins.* 575

2. In an action for a dissolution of a copartnership, and for an accounting between the partners, the answer alleged a violation on the part of plaintiff of a provision in the articles of copartnership, providing for a sale of the good will of the business to such of the partners as should bid the highest price, by his appropriating to himself the good will, and that the same was worth as an asset \$200,000, which he asked to counter-claim against any sum found due the plaintiff. As a further counter-claim the answer alleged a fraudulent misappropriation by plaintiff of partnership funds. *Held*, that the matters so set up did not present a counter-claim, of a separate and distinct cause of action, within the meaning of said section; that the matters set up were proper items to be proved upon an accounting; and that defendant was not entitled to a trial by jury thereon. *Id.*

3. As to whether a separate cause of action could be maintained to recover the value of the good will, or for damages without an equitable accounting of the copartnership affairs, *quære*. *Id.*

COUNTY COURT.

1. The provision of the Code of Civil Procedure (§ 1342), in reference to appeals to the Supreme Court from orders of a County Court, confines the appellate jurisdiction to orders in actions originating in the County Court. *Andrews v. Long*. 573
2. Accordingly, *held*, that an order of County Court dismissing an appeal from a judgment of a justice of the peace, was not appealable to the Supreme Court. *Id.*

COURT OF APPEALS.

1. This court does not lose jurisdiction of a cause brought here upon appeal until the remittitur has been filed in the court below, and that court has taken some action thereon. *People ex rel. Smith v. Village of Nelliston*. 638
2. Accordingly *held*, that the court had jurisdiction to make an *ex parte* order, correcting a remittitur, which had been filed with the clerk of the court below; but upon which no action had been taken in that court. *Id.*

COURTS.

- *See* COUNTY COURT.
COURT OF APPEALS.
COURT OF COMMON PLEAS (NEW YORK CITY).
COURTS OF SESSIONS.
DISTRICT COURT (NEW YORK CITY).
MARINE COURT (NEW YORK CITY).
POLICE COURT (NEW YORK CITY).

COURT OF COMMON PLEAS OF THE CITY OF NEW YORK.

— *Judgment of, on appeal from an order of General Term of the*

Marine Court, reversing judgment and granting new trial is final.
See Gordon v. Hartman. 221

COURTS OF SESSIONS.

1. The provision of the act of 1879, extending the jurisdiction of Courts of Special Sessions (chap. 200, Laws of 1879), which gives to said courts exclusive jurisdiction, in the first instance, to hear and determine, among other things, "charges for assault and battery, not alleged to have been committed riotously," did not oust Courts of Sessions of jurisdiction to try pending indictments for that offence; it applies only to charges made subsequent to the passage of the act. *Ryan v. People*. 593
2. *It seems*, that the word "charges" implies an original complaint, made in the first instance, preliminary to a formal trial for a crime, it does not include indictments. *Id.*

COVENANTS.

1. Plaintiff and J. (to whose rights plaintiff subsequently succeeded) leased of R. certain premises for twenty-one years, from May 1, 1855. R. covenanted that if the lessees erected a building, as specified, upon the demised premises he would advance \$20,000, to be secured by the lessees' bond, and a mortgage upon the leasehold interest; and at the termination of the lease he would, at his option, either pay the appraised value of the building or execute a new lease for a further term. The building was erected, and the money loaned and secured as covenanted. In May, 1858, the lessors executed to C., defendant's testator, a sub-lease of the premises for seventeen years and six months, from August 1, 1858. C. covenanted "to assume, pay off, and discharge" said mortgage. In August, 1858, said lessees executed to C. another instrument, by which they agreed, upon his compliance with the covenants in said sub-lease, at the expiration of the term therein specified, "at and

upon the application" of C., or assigns, to grant a renewal for the further term of eighty-five days, and to execute an assignment of the right of said lessees to a renewal of the original lease. or to a payment of the moneys awarded to them for the value of the buildings and improvements. C. assigned the sub-lease and agreement; the holder thereof made no application for a renewal, as authorized by the agreement; but on the contrary gave written notice that he would not avail himself of such right; and at the expiration of the term specified in the sub-lease surrendered the premises. Plaintiff paid the mortgage, received from the lessors an agreed price for the improvements, and took a new lease. In an action on the covenant of C. to pay the mortgage, *held*, that plaintiff was entitled to recover; that under said covenant a cause of action arose upon failure of C. to pay the mortgage when it became due and payable; that conceding the sub-lease and subsequent agreement were to be taken and construed together, the covenant of C. in the former was not modified or affected by the latter; also, that, as neither C. nor his assigns availed themselves of the privileges of renewal, all their rights terminated at the expiration of the term specified in the sub-lease, the original lessees were at liberty to deal with the property as they chose, and their subsequent action furnished no defense. *Hume v. Hendrickson*.

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2. From the words of an express covenant, an additional or correlative covenant may be implied, if the language used shows that such covenant was intended; but such implication cannot be permitted where it is apparent from the contract that the parties had the subject in mind, and either one has withheld a promise in regard to it. *Bruce v. Fulton Nat. Bk.*

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CRIMINAL TRIAL.

1. Upon the trial of an indictment for murder, the prisoner chal-

lenged the array of jurors on the ground that, an order having been granted requiring the drawing of additional jurors, one of the boxes required to be kept by the clerk, i. e., that containing the names of jurors who had attended a term of the court, and served, had not been kept, and was not brought into court as required by the Code of Civil Procedure (§ 1059). The challenge was sustained; the prisoner thereupon withdrew it; a jury was empaneled, and the trial proceeded. *Held*, that the prisoner could withdraw his challenge, and that he thereby waived the irregularity. *Pierson v. People*.

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2. The prisoner was accused of having caused the death of W., the deceased, by poison. A physician who was called to see W. when sick from the poison, and who examined and prescribed for him, as a witness for the prosecution was asked to state the condition in which he found W. at that time, both from his own observation and what W. told him; this was objected to on the ground that the evidence was prohibited by the statute (Code of Civil Procedure, § 834). The court overruled the objection, and the witness stated what he learned from his own examination of W., made in the presence of W.'s wife and the prisoner, and from their statements. There was nothing of a confidential nature in anything he so learned. *Held*, that the evidence was competent. *Id.*

3. The object of the statute prohibiting the disclosure of professional information acquired by a physician in attending a patient, is to protect the the latter, not to shield one charged with his murder. *Id.*

4. After evidence had been given on the part of the People showing an intimacy between Mrs. W. and the prisoner, who was a married man, before and after the death of W., and that the prisoner disappeared from his home February 19, 1877, eleven days after the death of W., the prosecution called B., a clergyman who re-

- sided in Michigan; he testified that the prisoner called at his residence with Mrs. W., February 26, 1877. The witness was then asked to state what took place between him and them at that time; this was objected to, and the objection overruled. The witness answered, in substance, that he married them, after the prisoner had, under oath, stated that there was no legal objection to his being married. *Held*, that the evidence was competent as showing motive, although it tended to prove another crime than that charged in the indictment. *Id.*
5. A writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken upon trial. *Eigby v. People.* 546
6. No exception lies to a refusal to postpone a criminal trial by reason of the absence of witnesses. *Id.*
7. An indictment charged perjury in testimony given by the accused before a referee, in a case where a reference was ordered on default, a decision had, and judgment rendered. The testimony was in reference to the loss of a will; there was no question as to its execution. The accused moved to postpone, upon affidavit, that two material witnesses were absent; one of whom was a subscribing witness to the will; the other, it was alleged, was acquainted with a witness for the people. It was not alleged that a subpoena had been taken out, or any effort made to secure their attendance. The motion was denied. *Held*, that if the question as to the refusal to postpone was reviewable here, there was no error. *Id.*
8. Also, *held*, that the accused was not entitled to a postponement on the ground that a civil action was pending, involving the facts in reference to which the alleged perjury was committed. *Id.*
9. Also, *held*, that proof of the entry of the order of reference was not required, the granting of the order gave the referee jurisdiction. *Id.*
10. The testimony of the prisoner, which was alleged to be false, was to the effect that one A. had told him that he had taken charge of all of the papers of the testator after his decease, and in moving them lost the will; that he had requested A. to make an affidavit of such fact, which he did. The prosecution was allowed to prove, under objection and exception, that the testator in his life-time burned a paper resembling the will, he declaring at the time that it was his will, and stating its provisions and his reason for destroying it. *Held*, no error; that the declarations were competent, as part of the *res gestæ*. *Id.*
11. But, *held*, that evidence of declarations of the deceased, made after the alleged destruction of the will, were incompetent. *Id.*
12. Also, *held*, that it was competent for the prosecution to show that when A. signed the affidavit, sworn to by him, he was imposed upon by the prisoner, he substituting it for another A. had heard read, which did not contain the clause in question. *Id.*
13. Also, *held*, that the judgment-roll in the civil action was competent evidence. *Id.*
14. Also, *held*, that a refusal of the court to compel the district-attorney to furnish to the prisoner's counsel all the evidence before the grand jury was not error; that it was a matter within the discretion of the court. *Id.*
- *Competency of evidence on trial of indictment for assault and battery.*
See Ryan v. People. 593
- ### DEED.
1. To avoid a deed for champerty under the statute (1 R. S., § 147), actual, not constructive adverse possession in another is required. *Dawley v. Brown.* 300
2. It must also appear that at the time of the delivery of the deed

the lands were in the actual possession of a person claiming "under a title adverse to the grantor." It is not enough that he claims title; he must claim under some specific title, which must be disclosed, so that the court may see that it is adverse to that of the grantor in the deed assailed.

Id.

3. An order of the Court of Chancery in proceedings to sell the real estate of an infant, adjudged that the special guardian who signed the petition should execute a sufficient conveyance of the interest of the infants; a deed was executed by him in his own name as special guardian; the names of the infants appeared in the deed. *Held*, that the deed was in proper form; that it was not necessary to have it executed in the name of the infants. *Cole v. Gourlay*. 528

4. Under the provision of the act of 1830, in reference to married women (§ 3, chap. 90, Laws of 1860), declaring that no conveyance of real estate, by a married woman, "shall be valid without the consent, in writing, of her husband," it was not required that such consent should be a part of or concurrent with the execution of the conveyance, or that it should be given before the delivery thereof; where given thereafter, it validated the conveyance; at least, if given before any attempt, upon the part of the wife, to avoid the conveyance. *Wiley v. Schramm*. 619

— *In trust, when it vests whole estate in trustees.*

See Bennett v. Garlock. 802

See GRANTOR AND GRANTEE.

DEFENSES.

1. Neither the fact that a check was dishonored when transferred, or that presentment for payment has been delayed, discharges the drawer. If dishonored, any defense thereto against the payee will be available against his transferee; but no presumption arises

that over-due or dishonored paper is invalid. If loss results to the drawer by delay in presentment, that is matter of defense. *Cowing v. Altman*. 167

2. The maker of a promissory note, in an action thereon by a transferee, cannot assail plaintiff's title on the ground that the transfer was made in fraud of the creditors of the payee; the transfer can only be assailed on that account by the creditors or some one representing them. *Sullivan v. Bonesteel*. 631

DEFINITIONS.

1. The word "children," as used under the provision of the statute of distribution in reference to advancements (2 R. S., 97, § 70), includes all the descendants of the intestate entitled to share in his estate. *Beebe v. Estabrook*. 246
2. *It seems*, that the word "charges," in the provision of the act of 1870, extending the jurisdiction of Courts of Special Sessions (chap. 390, Laws of 1879), which gives to said courts exclusive jurisdiction, in the first instance, to hear and determine, among other things, "charges for assault and battery, not alleged to have been committed riotously," implies an original complaint, made in the first instance, preliminary to a formal trial for a crime, it does not include indictments. *Ryan v. People*. 593
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3. The "refusal" spoken of in the provision of the statute in reference to bills of exchange (1 R. S., 769, § 11), which declares that one upon whom a bill is drawn and delivered for acceptance, who destroys or refuses to deliver it, shall be deemed to have accepted it, is an affirmative act, or is made up of conduct tantamount to one; it is also a wilful or wrongful act. *Matteson v. Multon*. 627

— *The words "reciprocal demands," in the provision of the Code of Procedure (§ 95), specifying when a cause of action "upon a mutual, open and current account, where*

there have been reciprocal demands between the parties," shall be deemed to have accrued, means no more than "mutual accounts," as used in the former statutes.

See Green v. Disbrow.

1

DEPOSITIONS.

1. *It seems, that while a judge, in settling interrogatories to be annexed to a commission to take testimony, is required to allow "any question pertinent to the issue" (Code of Civil Procedure, § 802), he has authority to disallow questions not pertinent, and hence to determine whether a question is pertinent or not. Uline v. N. Y. C. and H. R. R. Co.*

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2. The power to exclude questions, however, should be sparingly exercised. *Id.*

3. The judge in such case has not the discretion which the court has on trial as to the extent to which he will permit a cross-examination, for the purpose of merely testing the credit of the witness, and upon matters collateral to the main issue; he must insert all pertinent questions. *Id.*

4. The decision of the judge in settling the interrogatories is an order (Code, § 767); if it disallows a pertinent question, it affects a substantial right; and is therefore appealable. (Code, §§ 1347, 1343.) *Id.*

5. As to whether the party has a remedy in such case by mandamus, to compel the allowance of the question, *quære.* *Id.*

6. An appeal does not lie from an order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial. (Code, § 911.) *Id.*

7. In an action to recover damages for injuries alleged to have resulted from defendant's negligence, a release was set up as a defense; this the plaintiff claimed was a forgery. A commission was issued

on behalf of defendant, to take the testimony of the person who plaintiff alleged forged the release, as to the alleged settlement. Plaintiff after a cross-interrogatory calling for the salary paid to the witness, proposed others, asking the amount of the witness' expenses per annum, whether he left the place by day or night, by whom he was accompanied, and where he stopped; also, as to the amount of the debts he left unpaid; whether before he left he purchased an India shawl, and at what price, and whether he borrowed money of certain persons specified. These cross-interrogatories were disallowed; *held, error.* *Id.*

8. Where the deposition of a party, taken before trial, is read thereon without objection, he is not thereby precluded from being examined on trial. *Misland v. Coynton.*

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DESCENT.

The provision of the statute of distribution (2 R. S., 97, § 76) and of the statute of descents on the subject of advancements (1 R. S., 752, § 23) are to be taken and construed together, as the two statutes are in *pari materia.* *Deebe v. Es'abrook.*

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DEVISE.

1. Where a legacy is given, and is directed to be paid by the executor, who is a devisee of real estate, such estate is charged with the payment of the legacy; and the devisee, upon accepting the devise, becomes personally bound to pay the legacy; and this, although the land devised to him proves to be less in value than the amount of the legacy. *Brown v. Knapp.*

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2. *It seems, that payment of such a legacy may be enforced by a suit in equity against the real estate, or by an action directly against the devisee upon the promise to pay implied by the acceptance of the devise.* *Id.*

3. Under the provision of the Revised Statutes (1 R. S., 749, § 3), which provides that the title of a *bona fide* purchaser, for a valuable consideration, from the heirs-at-law of a person who died seized of real estate, shall not be defeated or impaired by a devise by such person of the real estate so purchased, unless the will containing the devise shall have been duly proved or recorded within four years after the death of the testator, except, among other things, where it appears that the will has been concealed by the heirs or some one of them, the exception does not apply where the devisees or some one of them have knowledge and possession of the will, and it is taken from such possession clandestinely by an heir and secreted or destroyed; it only applies to a concealment, which leaves the devisees in ignorance of their rights under the will, and deprives them of knowledge of its existence. *Cole v. Gourlay.* 527

4. In an action of ejectment, plaintiffs claimed under a devise in the will of their father who died in 1836. The devise was to the wife of the testator for life, remainder to plaintiffs. The will after the death of the testator went into the possession of his widow, who was named therein as executrix. In 1841 the will was clandestinely taken by one of the plaintiffs and concealed until 1855, when it was presented for probate. In 1841 proceedings were instituted in the Court of Chancery under the statute to sell the real estate in question, all of the heirs-at-law of the deceased being minors. By virtue of an order in such proceedings the interests of the minors in the premises were sold and conveyed to S. in 1841, who was a purchaser in good faith, for value, without notice of the will. S. and his successors in interest have occupied, claiming title, since that time. Defendant claimed under said deed to S. One of the plaintiffs became of age in 1844, the other in 1847. *Held*, that S. acquired a good title, which was not affected by the devise; that the case was not affected by the exception in said pro-

vision of the Revised Statutes, providing, that where the devisee is a minor, the limitation shall not commence to run until one year after he becomes of age, as more than five years had run after plaintiffs became of age, before the will was produced for probate; and that the exception above specified in case of concealment, had no application. *Id.*

DISTRIBUTION.

1. M. died intestate, leaving no descendant, parent, brother, sister, descendant of any brother or sister, uncle, or aunt, but leaving first cousins, and the children of deceased first cousins. *Held*, that the first cousins were entitled to the personal estate, to the exclusion of said children. *Adee v. Campbell.* 52
2. The statute of distribution (2 R. S., 96, § 75, subds. 5, 11), provides for no representation among collaterals, except in the case of children of brothers and sisters of the intestate; if there are none of these the nearest of kin, in equal degree, take the whole. *Id.*
3. Under the provision of the statute of distribution in reference to advancements (2 R. S., 97, § 76), the descendants of a child of an intestate, who died before him, are entitled, on the final distribution of his estate, when it consists exclusively of personal property, to the benefit of advancements made by him in his life-time to his other children, and such advancements are to be taken into consideration in determining the distributive shares. *Beebe v. Estabrook* 246
4. The word "children," as used in said provision, includes all the descendants of the intestate entitled to share in his estate. *Id.*

DISTRICT COURTS (NEW YORK CITY)

— *Commissioner of Public Works authorized to appoint janitors for buildings in which courts are held.*
See Kennedy v. Mayor, etc. 361

DRAINAGE.

1. Defendant, by means of sewers and the manner of grading of one of its streets, concentrated the surface-water and sewage of a large territory and discharged it in one body into a ravine. A small rivulet formerly ran down through this ravine. Defendant, with the consent of the proprietors, had changed this water-course by constructing a box-drain two or three feet square in its place. The water discharged, as aforesaid, into the ravine, passed over ground, used as a dumping place for refuse, and then down the ravine into the box-drain, and having no sufficient outlet flooded plaintiff's premises below and deposited thereon the filth carried by the sewers, and the sand and dirt washed down from the dumping-ground. It did not appear that defendant owned any of the lands between the sewer and the water-course. In an action to recover the damages, *held*, that the facts established *prima facie* a cause of action, and that they justified a submission of the case to the jury. *Noonan v City of Albany.* 470

2. It appeared that the box-drain was obstructed below plaintiff's premises, so that the water and sewage were prevented from passing therein, as it otherwise would; it did not appear that this was attributable to any act of plaintiff's, or for which he was responsible; he had no control over the drain below his premises. *Held*, that this did not constitute a defense; that plaintiff was not bound to protect himself from the illegal act of the defendant by removing or causing the removal of the obstruction. *Id.*

EJECTMENT.

1. An application for a new trial, under the statute, in an action of ejectment, was made on behalf of defendant and one L., who claimed to have derived his interest from B. who, it was alleged, was the landlord under whom defendant

was in possession. The right of L. was expressly controverted by the opposing affidavits, and it was also shown that, when the action was ready for trial, defendant withdrew his answer, and judgment was entered by his consent in open court. The application was made by an attorney who was not the attorney of record of defendant, and who had not been substituted in place of the original attorney. The application was denied with leave to renew. *Held*, that as it was at least very uncertain what were the facts, and whether a case was made out within the statute (2 R. S., 309, §§ 36, 37, as amended by chap. 485, Laws of 1862), and as the moving parties had not availed themselves of the permission given to supply the defects, the order should be affirmed. *Sacia v. O'Connor.* 260.

2. The requirement that to sustain a plea of a former action pending it must appear to the court that the first action was for the same cause as the second, is to be strictly enforced; it is not enough that the property in controversy in both actions is the same. *Dawley v. Brown.* 390

3. The rule is the same in actions of ejectment. *Id.*

4. A judgment in ejectment is only conclusive, under the statute (2 R. S., 235, § 36), as to the title litigated and established in the action; it is not the recovery which constitutes an estoppel in a subsequent action, but the decision of the question which was in contestation between the parties. *Id.*

5. So, also, in case of a plea of a former suit pending in an action of ejectment, the point is whether the same title is sought to be litigated in both actions; if not, the former action is not a bar. *Id.*

6. In an action of ejectment plaintiff claimed under a devise from his father, a deed from himself to C., in March, 1857, and a reconveyance from C. in July 16, 1869. It appeared that a former action was commenced by plaintiff, after his

deed to C. and before the reconveyance, against defendant, one F., and others. What the original complaint was did not appear. The default of defendant and F. was entered therein July 6, 1869, and by an *ex parte* order the summons and complaint were amended by striking out the names of all the defendants therein except the defendant here and F., and by making the complaint one in ejectment, for lands including the premises claimed in this action, and judgment was thereupon entered against defendant and F. for the recovery of the said lands. A writ of possession was issued, and on the same day plaintiff went with the sheriff upon the lands, to be put in possession, when defendant and two other persons in possession of part of the lands, attorned in writing to plaintiff, and the sheriff made return that he had delivered full possession to plaintiff, which return was filed July fourteenth. On July twenty-sixth, an order was made vacating and setting aside said judgment, and re-instating defendant and F. in possession. *Held*, that the deed from C. to plaintiff was not void under the statute against champerty (1 R. S., 739, § 147): 1st. As prior to its date plaintiff had been put in possession and defendant had attorned to him, which attornment was then in force; the subsequent vacation of the judgment did not relate back so as to make the deed void on the ground that defendant was then holding adversely. 2d. Because it did not appear that defendant claimed under any specific title adverse to that of C. *Id.*

7. Defendant set up the pendency of the former action as a bar. *Held*, untenable, as at the time of bringing the former action the title was in C., and the subsequently acquired title of plaintiff from C. could not avail him in that action, it was, therefore, necessary to bring a new action to recover upon that title; that although if the plaintiff had evidence which would sustain the first action, the same evidence might entitle him to recover in the second, the evidence upon which

he relied in the second would not sustain the first. *Id.*

8. In an action of ejectment, plaintiff claimed under a sheriff's deed on sale on execution against T., who then owned the legal title. Summary proceedings were instituted to remove T. and defendant, which resulted in an adjudication in favor of the judgment-creditor, and a warrant of removal was issued. T. thereupon took a lease of the premises, and defendant executed a contract, whereby he agreed not to take any advantage of the possession of T. under the lease, until the proceedings were reversed. The judgment-creditor in consequence refrained from executing his warrant. *Held*, that while occupying this position the defendant, as well as T., was estopped from denying plaintiff's title. *Territt v. Cowenhoven*. 400
9. In an action of ejectment, plaintiffs claimed under a devise in the will of their father who died in 1836. The devise was to the wife of the testator for life, remainder to plaintiffs. The will after the death of the testator went into the possession of his widow, who was named therein as executrix. In 1841 the will was clandestinely taken by one of the plaintiffs and concealed until 1855, when it was presented for probate. In 1841 proceedings were instituted in the Court of Chancery under the statute to sell the real estate in question, all of the heirs-at-law of the deceased being minors. By virtue of an order in such proceedings the interests of the minors in the premises were sold and conveyed to S. in 1841, who was a purchaser in good faith, for value, without notice of the will. S. and his successors in interest have occupied, claiming title, since that time. Defendant claimed under said deed to S. One of the plaintiffs became of age in 1844, the other in 1847. *Held*, that S. acquired a good title, which was not affected by the devise; that the case was not affected by the exception in said provision of the Revised Statutes, providing, that where the devisee is a minor, the limitation shall not

commence to run until one year after he becomes of age, as more than five years had run after plaintiffs became of age, before the will was produced for probate; and that the exception above specified in case of concealment, had no application. *Cole v Gourlay*. 528

ELECTION OF OFFICERS.

1. The provisions of the act of 1872, "to regulate elections in the city of Brooklyn" (§§ 12, 13, chap. 575, Laws of 1872), providing for preserving the ballots, are germane to the subject expressed in the title; their incorporation in the act, therefore, does not render it violative of the provision of the State constitution, declaring that no private or local bill shall embrace more than one subject; and that shall be expressed in the title. (Art. 3, § 16.) *People ex rel. Dailey v. Livingston*. 279
2. The provision of said act (§ 13), requiring the board of canvassers to deposit the ballot-boxes in the department of police, does not require the canvassers personally to carry the boxes to the police department, nor does it require the boxes to be deposited at police headquarters; a delivery of the boxes by the canvassers to police officers assigned for that purpose, and a deposit of said boxes by such officers in the precinct station-houses, is a substantial compliance with the provision. *Id.*
3. The provision requiring, that after the canvass is completed and the ballots returned to the boxes, said boxes shall be "securely sealed up by the canvassers," contemplates that the boxes shall be so sealed that they cannot be opened without breaking the sealing. *Id.*
4. Where the inspectors sealed the apertures to the boxes, through which the ballots were inserted, and the canvasser did not remove these seals, but delivered the boxes to the police department without further sealing, *held*, that this was not a compliance with the act. *Id.*
5. But, *held*, that this provision was directory only, and where it is proved satisfactorily that the boxes had been kept "undisturbed and inviolate," the omission of the canvassers to seal up the boxes, as contemplated, does not render the ballots inadmissible as evidence. *Id.*
6. The burden of proof, however, is upon a party producing the ballot-boxes to show to the satisfaction of a jury that they have been kept undisturbed and inviolate; it is not sufficient that a mere probability of security is proved, the fact must be shown with a reasonable degree of certainty. *Id.*
7. The use of the ballots so preserved, as evidence, is not limited to cases of city officers merely, they are admissible as well in cases of other officers voted for in the city of Brooklyn. *Id.*
8. In an action of *quo warranto* wherein the ballot-boxes were produced and the ballots received in evidence to impeach the accuracy of the returns of the inspectors of election, and wherein it appeared that the boxes had not been sealed up by the canvassers, and had been kept insecurely, so that the question whether the ballots were the identical ones voted was one of fact for the jury, the court instructed the jury, in substance, that to justify their rejection, it must appear affirmatively by direct evidence, or from circumstances, that the boxes had been tampered with, *held*, error, and that the error was fatal to the judgment. *Id.*

ELECTION OF REMEDIES.

See REMEDIES.

EMINENT DOMAIN.

1. In proceedings under the provisions of the railroad act (subd. 6, § 28, chap. 140, Laws of 1850) by one

- railroad company to acquire the right to cross the railroad of another company, the petition was verified by one styling himself the consulting engineer of the petitioning company; it did not appear that he was an officer of said company; the other company answered the petition on the merits and went to a hearing on the petition and answer; it did not appear that any objection was made as to the verification. *Held*, that it was too late to raise the objection on appeal to this court; that by omitting to raise it below, it was waived. (DANFORTH, J., dissenting) *In re B. H. T. and W. R. R. Co.* 64
2. A defect in the verification of the petition is not a jurisdictional defect. (DANFORTH, J., dissenting.) *Id.*
 3. The petition alleged the inability of the two companies to agree upon the points and manner of crossing, and the compensation to be made therefor; this was not denied in the answer, and there was no offer to disprove it. *Held*, that proof thereof was not required to be given by the petitioner. *Id.*
 4. In such proceedings proof is not required on the part of the petitioner as to allegations of the petition not put in issue. *Id.*
 5. Said act authorizes more than one crossing by a railroad company of the track of another road. *Id.*
 6. The fact that the road of the petitioning company, at some points, is parallel with the road sought to be crossed, does not exclude said company from the provisions of the act. *Id.*
 7. The points of crossing are not necessarily fixed by the notice of the location of the new road, and the failure of the company, whose road is sought to be crossed, to object within fifteen days. The general provisions of the statute in regard to such location, and the right of property owners to object, are not applicable. *Id.*
 8. Objections to the proposed points of crossing, on the ground that they interfere with lands of the old company, already appropriated for stations, etc., are not proper to be raised on application for the appointment of commissioners; they are matters to be considered by the commissioners. *Id.*
 9. *It seems*, that said act does not authorize the invasion of lands or buildings already appropriated to railroad uses which, in their nature, require an exclusive occupation, or which would be materially impaired by subjecting the land to the new use. *Id.*
 10. Under the provision of the railroad act (sub. 6, § 28, chap. 140, Laws of 1850), authorizing proceedings by one railroad company to acquire the right to cross the railroad of another company, an attempt to agree with such other company as to the points and manner of crossing, and as to the amount of compensation, is a condition precedent to the authority of the court to appoint commissioners; and unless this is averred in the petition, there is no jurisdiction. *In re B. H. T. and W. R. R. Co.* 69
 11. Where one railroad company has leased the road of another, such lessee is a necessary party to a proceeding, under said provision, by a third company, to acquire the right to cross the leased road; it may voluntarily agree with the petitioner in respect to the crossing, and such agreement, while not binding upon the lessor, in respect to its interests as reversioner, binds the interests of the lessee. *Id.*
 12. In such case it is not essential that one proceeding shall embrace all the parties; it will only affect the parties brought in, and where the lessee is alone made a party, the estate in reversion will not be affected. *Id.*
 13. Where, therefore, such proceedings were instituted nominally against both lessor and lessee, but

- the petition contained no allegations of an attempt to agree with the lessor as to the points or manner of crossing or compensation, but did contain such allegations as to the lessee, *held*, that an order granting the prayer of the petition was proper, so far as it provided for the appointment of commissioners, as against the lessee, but was erroneous so far as it affected the lessor. *Id.*
14. It is within the power of the Legislature, in authorizing land to be condemned for a public use which may be permanent, to determine what estate therein shall be taken, and to authorize the taking of a fee or any less estate in its discretion. *Sweet v. Buff., N. Y. and Phil. R. R. Co.* 293
15. A fee may be taken, although the public use for which the land is to be taken is special and not of necessity permanent or perpetual. *Id.*
16. Where a statute authorizes the taking of a fee it cannot be held invalid, or that an easement only was acquired thereunder, on the ground that an easement only was required to accomplish the purpose in view. *Id.*
17. The act entitled, "an act authorizing the common council of the city of Buffalo to lay out a public ground for the purpose of maintaining and protecting a seawall or breakwater along the shore or margin of Lake Erie" (chap. 547, Laws of 1864), authorized the taking of a fee in lands required for the purpose specified; and under proceedings for that purpose taken as prescribed by the act which gave to the city all the interest authorized by the act, it acquired an absolute fee. *Id.*
18. The fact that the particular purpose for which the land was to be taken is expressed in the title and in the act does not qualify the estate taken; the purpose so declared simply regulates and defines the use for which the land shall be held. *Id.*
19. The said act does not conflict with the provision of the State constitution (art. 3, § 16) declaring that a private or local act shall include but one subject, which shall be expressed in its title. *Id.*

EQUITABLE CONVERSION.

1. Where a will directs real estate to be converted into money, and the proceeds distributed, the parties entitled thereto may, if of lawful age, and if the rights of others will not be affected, elect to take the lands and prevent the actual conversion thereof into personality. *Prentice v. Janssen.* 478
2. No distinct or positive act is required; a slight expression of intent will be considered sufficient to show an election. *Id.*
3. Where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended a sale, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative. *Power v. Cassidy.* 603

EQUITY.

See CANCELLATION OF WRITTEN INSTRUMENT.
INJUNCTION,

ERROR (WRIT OF)

1. A writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken upon trial. *Eighmy v. People.* 546
2. No exception lies to a refusal to postpone a criminal trial by reason of the absence of witnesses. *Id.*

ESTOPPEL.

1. In an action of ejectment, plaintiff claimed under a sheriff's deed on sale on execution against T. who then owned the legal title. Summary proceedings were instituted to remove T. and defendant,

which resulted in an adjudication in favor of the judgment-creditor, and a warrant of removal was issued. T. thereupon took a lease of the premises, and defendant executed a contract, whereby he he agreed not to take any advantage of the possession of T. under the lease, until the proceedings were reversed. The judgment-creditor in consequence refrained from executing his warrant. *Held*, that while occupying this position the defendant, as well as T., was estopped from denying plaintiff's title. *Territt v. Cowenhoven*. 400

2. A fact, admitted by a municipal corporation through its officer duly and properly acting within the scope of his authority, is evidence against it; and cannot be withdrawn to the prejudice of one who in reliance upon it has changed his position in respect to the matter affected thereby. *Curnen v. Mayor, etc.* 511
3. The doctrine of estoppel applies in such case to a corporation as well as to an individual. *Id.*
4. An estoppel by judgment in a former action arises when the same matter was at issue therein, and was either litigated by the parties and determined, or it might have been litigated and a decision had upon it. *Smith v. Smith*. 634
5. It is not necessary that it shall appear by the record of the prior suit that the particular controversy sought to be precluded was then necessarily tried and determined; it is sufficient if there might have been judgment in the first action for the same cause alleged in the second. *Id.*
6. An estoppel by a former action, effectual as between the parties, arises also in favor of or against those in privity with them. *Id.*
7. Whether the matter might have been tried in the former action must appear from the record; if it does so appear, oral testimony is competent in the second action to show that it was litigated, passed upon and determined. *Id.*

— *When mortgagor estopped from questioning validity of mortgage.*

See Best v. Thiel 15

— *Accommodation indorser of note payable to order of payee and negotiated by him without indorsement, as against bona fide holder, estopped from denying knowledge of form of note.*

See Irving Nat. Bk. v. Ally. 536

See FORMER ADJUDICATION.

EVIDENCE.

1. In an action upon an account for goods sold and delivered, defendant's son J., who purchased the goods on defendant's account after testifying as a witness for plaintiff that the principal articles of clothing and groceries for himself and family were obtained of plaintiff, that he often went himself and sent others to plaintiff's store for goods, was asked and permitted to state under objection and exception, the quantity and amount of articles thus purchased of plaintiff. *Held*, no error. *Green v. Disbrow*. 2
2. Plaintiff, after proof that defendant looked over and examined the account upon his books, offered in evidence a paper proved to be a statement of the account so examined; it was objected to on the ground that the account had not been sufficiently proved; no objection was made because of the non-production of the books. The objection was overruled and the statement received. *Held*, no error. *Id.*
3. In an action to recover damages for alleged negligence causing the death of K., plaintiff's intestate, upon the cross-examination of S., a witness for plaintiff, who had given material testimony for him, and who had been in defendant's employ, he was asked if he was discharged for inefficiency and drunkenness; if he was discharged at all; and if O., his "immediate boss," did not assign these reasons for discharging him, to all of which he answered, "No." O. was called

- by defendant's counsel, who offered to prove by him, that he became aware that S. was in the habit of being intoxicated, and neglected his duty, and that he was discharged for that reason. This was excluded. *Held*, no error; that the fact of his discharge was immaterial; that if the discharge was for inefficiency or drunkenness, this could not be proved by way of impeachment, and was matter collateral to the issue, as to which the answers of S. were conclusive; that if such grounds for the discharge were communicated to S., it might lay the foundation of an inquiry as to his feelings toward defendant; but as defendant did not offer to show this, and as it was not disclosed on the trial that the offer was to show a hostile feeling, the question could not be presented here. *Kirkpatrick v. N. Y. C. and H. R. R. Co.* 240
4. Plaintiff, who had invented an improved cotton gin, and had applied for letters patent therefor, contracted to sell the same to defendants, and to assign the letters patent when obtained, for a sum specified; the contract contained a warranty that said cotton gin would "be equal in all respects to the best saw gin then in use." In an action upon the contract, wherein defendant set up a breach of the warranty as a defense, *held*, that the testimony of men, competent from education and experience to express an opinion as to whether plaintiff's invention was in fact equal to the best saw gins, was competent; that the inquiry related to a matter which was not the subject of general knowledge but which depended on facts, from their nature difficult if not impossible to be testified to, and it could only be answered by one having peculiar knowledge and skill in the use of this and other machines. *Scattergood v. Wood.* 263
5. Plaintiff having given evidence as to the comparative merits of this and other machines, *held*, that he could not object to the giving of similar evidence on behalf of defendant. *Id.*
6. The declarations of a sole administrator or executor, made, when not acting in the discharge of his duties, to third parties having no interest in or connection with a claim belonging to the estate, are not evidence against him in an action brought by him in his representative capacity upon such claim. *Church v. Howard* 415
7. In an action, by an administrator, upon a promissory note, signed by H. as surety, the defense was that the note had been altered, without defendant's consent. A witness called for the defense was asked to state a conversation between her and plaintiff, after the death of the intestate, in relation to the note. This was objected to on the ground that the declarations of the administrator were not evidence against the payee of the note. The objection was overruled, and the witness answered, in substance, that plaintiff stated he erased a clause in the note, at the request of the deceased. Plaintiff was not, at the time of the conversation, doing any business in connection with the estate, and the witness had no connection with or interest in the note. *Held*, error; and that the objection was sufficient to present the point as to the competency of such admissions. *Id.*
8. F., the maker of the note for whom H. signed as surety, who was a party defendant, but who did not answer, as a witness for the defense, was permitted to testify to personal transactions between himself and the intestate. *Held*, error, that the witness was "a person interested in the event," within the meaning of section 829 of the Code of Civil Procedure, and was, therefore, incompetent; also, *held*, that the fact that plaintiff subsequently testified as to the facts sworn to by F. did not cure the error. *Id.*
9. Another defense was the statute of limitations. H., as a witness in his own behalf, was asked whether he had any interest in the note, or derived any benefit from it. This was objected to on the ground of the incompetency of the witness

undersaid section. The objection was overruled. H. answered that he had not; that he was an accommodation maker, and had never paid any interest on the note, or authorized or directed it to be paid, or knew that any had been paid. *Held*, error, that the whole testimony was responsive to the questions put, and all of it was incompetent. *Id.*

10. H. was permitted to testify, under objection, that F. told him his name had been taken off the note, and that the intestate said she would see his name was taken off. *Held*, error. *Id.*

11. So, also, *held*, as to evidence of H. to the effect that he did not suppose he was on the note, and that if he had known it he could have obtained security from F. before his failure. *Id.*

12. Also, *held*, that the fact that the case was submitted to the jury on the sole question as to the alteration of the note, did not remedy the error. *Id.*

13. The prisoner was accused of having caused the death of W., the deceased, by poison. A physician who was called to see W. when sick from the poison, and who examined and prescribed for him, as a witness for the prosecution was asked to state the condition in which he found W. at that time, both from his own observation and what W. told him; this was objected to on the ground that the evidence was prohibited by the statute (Code of Civil Procedure, § 834). The court overruled the objection, and the witness stated what he learned from his own examination of W., made in the presence of W.'s wife and the prisoner, and from their statements. There was nothing of a confidential nature in anything he so learned. *Held*, that the evidence was competent. *Pierson v. People.* 424

14. After evidence had been given on the part of the People showing an intimacy between Mrs. W. and the prisoner, who was a married man, before and after the death

of W., and that the prisoner disappeared from his home February 19, 1877, eleven days after the death of W., the prosecution called B., a clergyman who resided in Michigan; he testified that the prisoner called at his residence with Mrs. W., February 26, 1877. The witness was then asked to state what took place between him and them at that time; this was objected to, and the objection overruled. The witness answered, in substance, that he married them, after the prisoner had, under oath, stated that there was no legal objection to his being married. *Held*, that the evidence was competent as showing motive, although it tended to prove another crime than that charged in the indictment. *Id.*

15. In an action upon a policy of fire insurance, it appeared that when the issuing of the policy was reported to defendant by its agent, it at once notified him to cancel the policy, unless the "average clause" was inserted; this notice did not reach the agent until after the fire. On the trial defendant's counsel asked one of its witnesses whether "an average clause in a policy is favorable or unfavorable to an insurance company." This was objected to and excluded. *Held*, no error. *Standard Oil Co. v. Amazon Ins. Co.* 506

16. Upon trial of indictment for perjury, the testimony of the prisoner, which was alleged to be false, was to the effect that one A. had told him that he had took charge of all of the papers of E. after his decease, and in moving them lost his will; that he had requested A. to make an affidavit of such fact, which he did. The prosecution was allowed to prove, under objection and exception, that the testator in his life-time burned a paper resembling the will, he declaring at the time that it was his will, and stating its provisions and his reason for destroying it. *Held*, no error; that the declarations were competent, as part of the *res gestæ*. *Eighmy v. People.* 547

17. But, *held*, that evidence of declarations of the deceased, made after the alleged destruction of the will, were incompetent. *Id.*
18. Also, *held*, that it was competent for the prosecution to show that when A. signed the affidavit, sworn to by him, he was imposed upon by the prisoner, he substituting it for another A. had heard read, which did not contain the clause in question. *Id.*
19. Also, *held*, that the judgment-roll in the civil action was competent evidence. *Id.*
20. Upon the trial of an indictment for assault and battery, the offence was alleged to have been committed during an affray at a town meeting; one of the witnesses for the prisoner was asked on cross-examination whether he had been indicted, for assault and battery, committed on that day, this was objected to, objection overruled, and the witness answered "yes," *held*, that it was a fair inference that the witness was indicted as one of the participants in the affray; and that the question was competent to show the position he occupied, in respect to the controversy, out of which the affray arose, and his interest in the litigation, and as showing prejudice or bias. *Ryan v. People.* 593
21. *It seems*, that the mere fact that a witness has been indicted, cannot legitimately tend to discredit him or impeach his moral character, and that evidence thereof is therefore incompetent; (FOLGER and EARL, JJ., dissenting, and holding that the allowance of questions on cross-examination of a witness, as to his having been indicted, are in the discretion of the court). *Id.*
22. One of the witnesses for the prosecution, when asked what he saw of the occurrence, answered among other things, "I should judge he (the complainant) struck a stone," this was on motion struck out, *held*, no error, as it was not responsive to the question, and was a conjecture, not knowledge *Id.*
23. Also, *held*, that evidence that the prisoner made an effort to keep out of the way of the sheriff was competent. *Id.*
24. *It seems*, however, that such evidence is very slight, if any evidence of guilt. *Id.*
25. Where a party was called as a witness by the adverse party and was examined as to a transaction with a deceased party in reference to which he would have been precluded from testifying in his own behalf under the Code of Procedure (§ 399), *held*, that the witness was entitled, upon cross-examination, to explain his testimony, and to state the whole transaction. *Merritt v. Campbell.* 625
26. Where the deposition of a party, taken before trial, is read thereon without objection, he is not thereby precluded from being examined on trial. *Misland v. Boynton.* 630
27. Where evidence which is entirely collateral is drawn out on cross-examination. it cannot be contradicted. *Id.*
28. The admissions of a witness out of court are not competent evidence to prove his interest in the litigation. *Id.*
- *In an action against a railroad company for negligently causing the death of a person, evidence on the part of the defendant that the deceased had an insurance on his life, is incompetent.*
See Kellogg v. N. Y. C. and H. R. R. Co 73
- *Admissibility of ballots as evidence under the act regulating elections in the city of Brooklyn (chap 575, Laws of 1872).*
See People ex rel. Dailey v. Livingston. 279
- *Admissibility of other writings for the purpose of comparison with writings whose genuineness is disputed, and of evidence in regard thereto.*
See Merritt v. Campbell (Mem). 625

EXCEPTIONS.

1. In the absence of any motion or act, on the part of a defendant, upon the trial of an action from which an assent to a decision of the case by the court, and a waiver of the right to go to the jury may be implied, an exception to a direction of a verdict for plaintiff is sufficient to present the point on appeal that there were questions of fact for the jury; it is not necessary to request the submission of any such fact. *First Nat. Bank of Springfield v. Dana.* 108
2. It is not essential, in an exception to a portion of a charge, to repeat the language excepted to, although this is strictly the more accurate practice; it is sufficient if the portion objected to is pointed out with such accuracy that there can be no misapprehension as to the application of the exception. *People ex rel. Dailey v. Livingston.* 280
3. This court can only review judgments and grant new trials for errors of law; and such errors must be pointed out by exceptions taken at a proper time. *Standard Oil Co. v. Amazon Ins. Co.* 506
4. Where, therefore, it is alleged that a verdict is perverse, excessive in amount, and contrary to the law and the evidence, the judgment entered thereon cannot be reviewed here without an exception. *Id.*
5. This rule has not been changed by the provision of the Code of Civil Procedure (§ 999) in reference to the granting of a new trial by the judge presiding at the trial. *Id.*
6. For such errors, *it seems*, the General Term has power to grant a new trial in its discretion, although no exceptions were taken on the trial. *Id.*
7. A writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken upon trial. *Eighmy v. People.* 546

8. No exception lies to a refusal to postpone a criminal trial by reason of the absence of witnesses. *Id.*

— *Insufficiency of, to raise question on appeal.*

See Richmond v. N. F. Ins. Co.
230

EXECUTORS AND ADMINISTRATORS.

1. The provisions of the Revised Statutes (2 R. S., 88, §§ 34, *et seq.*) in reference to publication by executors and administrators of notice to those, having claims against the deceased, to exhibit them, and the provision (§ 38) limiting the time for commencing suits upon claims disputed or rejected, include claims which are contingent, as well as those where the liability is certain and fixed. *Cornes v. Wilkin.* 129
2. Plaintiff and B., defendant's testator, were co-sureties upon an undertaking given on appeal; the judgment appealed from was affirmed July 5, 1873; an action was commenced against plaintiff August 28, 1873; judgment was perfected therein against him September 17, 1873, which he paid November 11, 1873. Defendant obtained an order for the publication of notice to creditors September 13, 1873, and such notice was on that day published. Plaintiff served upon defendant a claim for contribution, April 15, 1874, which was immediately rejected. This action upon such claim was commenced November 27, 1876. *Held*, that the six months limitation, prescribed in said statute, applied to the claim; that the fact that the first publication of notice was prior to the establishment of plaintiff's liability was immaterial; and that the action was barred. *Id.*
3. Also, *held*, that an omission of a middle letter in the name of the testator, in the notice published, was immaterial; and that this was so, although there was a person living of the same name as that published, as the law recognizes

but one Christian name, and as it did not mislead. *Id.*

4. Defendant, in May, 1874, wrote to plaintiff's attorney, offering to submit the controversy under section 872 of the Code of Procedure; said attorney wrote a letter in March, 1876, accepting the proposition, to which defendant made no reply. *Held*, that the offer was not a waiver of the statute; that to constitute a waiver the offer should have been accepted within the six months, and this followed by an actual submission. *Id.*
5. The declarations of a sole administrator or executor, made, when not acting in the discharge of his duties, to third parties having no interest in or connection with a claim belonging to the estate, are not evidence against him in an action brought by him in his representative capacity upon such claim. *Church v. Howard.* 415

EXECUTION.

1. Notwithstanding a levy under an execution upon his personal property, the judgment debtor remains owner; and can convey title, subject to the lien created by the execution. *Mumpher v. Rushmore.* 19
2. An assignee for the benefit of creditors, of the debtor, acquires a title subject to such lien, good against all persons until the assignment is impeached for fraud. *Id.*
3. Plaintiff's entered into a contract with S. & G., by which the former agreed to malt for the latter 25,000 bushels of barley from October 1, 1875, to June 1, 1876, at a price specified. Plaintiff's were to purchase the barley, and ship the malt when directed by S. & G., who were to have the increase. S. & G. agreed to accept plaintiff's drafts "in payment for the purchase of the barley," or to furnish satisfactory notes. At the close of each month plaintiff's were to furnish a statement of the amount malted, and on presentation S. & G. agreed to pay the price for malting. S. & G. also agreed to

pay interest, exchange and insurance on the barley and malt from the time the barley was paid for by plaintiff's until the malt was delivered. Plaintiff's were authorized to retain and hold as security, after June first, a sufficient amount of the malt to pay any notes or drafts then unpaid. In an action for malt manufactured under the contract, but not delivered or paid for, which had been levied upon by defendant as sheriff, under and by virtue of an execution against S. & G., *held*, that the legal title in the malt was in the plaintiff's until paid for, and that S. & G. had no leviable interest therein. *Tuthill v. Bogart.* 215

EXPERTS.

Plaintiff, who had invented an improved cotton gin, and had applied for letters patent therefor, contracted to sell the same to defendants, and to assign the letters patent when obtained, for a sum specified; the contract contained a warranty that said cotton gin would "be equal in all respects to the best saw gin then in use." In an action upon the contract, wherein defendant set up a breach of the warranty as a defense, *held*, that the testimony of men, competent from education and experience to express an opinion as to whether plaintiff's invention was in fact equal to the best saw gins, was competent; that the inquiry related to a matter which was not the subject of general knowledge but which depended on facts, from their nature difficult if not impossible to be testified to, and it could only be answered by one having peculiar knowledge and skill in the use of this and other machines. *Scattergood v. Wood.* 263

FINDINGS OF LAW AND FACT.

1. In a case tried by the court, a finding of fact, without evidence to support it, if excepted to, presents a question of law subject to review in this court. *Sickles v. Flanagan.* 224

2. To reverse the conclusions of law of a referee it must appear from the facts found that they are erroneous. *Collender v. Phelan*. 366
3. To sustain an exception to the refusal of a referee, to find facts as requested, it is incumbent upon the party to show that the material facts, so requested to be found, were established by uncontroverted evidence, and that if found they would have affected the result. *Stewart v. Morss*. 629
4. No question can be raised in this court, upon a matter of fact, in a case tried by a referee, as to which no facts were found by the referee, or requested to be found. *Id.*

FIXTURES.

— *When question whether machinery is a fixture or personal property, will not be determined on motion.*

See M. L. Ins. Co. v. Bigler. 568

FORECLOSURE.

1. Defendant A. being the owner of certain premises, subject to a mortgage then on record, sold and conveyed a portion thereof to D. and M., which, as stated in the deed, was "supposed to be eighty acres," the grantor covenanting that in case of a deficiency she would pay therefor at the rate of thirty dollars per acre; the grantees, as the consideration for the conveyance, assumed and agreed to pay the whole mortgage; subsequently, it having been ascertained that there was a deficit in quantity of the land conveyed, A. executed to her said grantees a writing agreeing that she would save them harmless, to the amount of \$273.32, the sum agreed to be paid for such deficit, from any claim under the mortgage. A. subsequently conveyed the residue of the premises to other parties, covenanting that the same was free and clear of all incumbrances. In an action to foreclose the mort-

gage, *held*, that the grantees of such residue were entitled to no other or greater equities than those which A. had at the time she conveyed; that the residue was presumably chargeable in equity with the payment of \$273.32 of the mortgage, and the portion so conveyed to D. and M. was chargeable with the balance; that the fact that the covenant of D. and M. to pay the mortgage was contained in a deed on record was immaterial; as were also the facts that the agreement of A. to re-assume the amount of the rebate for the deficiency, was not on record, and that the grantees of the residue had no notice thereof. *Judson v. Dada*. 378

2. In an action for the foreclosure of a mortgage, after judgment, and a sale in pursuance thereof, and while awaiting the confirmation of the court for the payment of the purchase money and the delivery of the deed, the court has authority on the petition of the purchaser to restrain the mortgagor from committing waste. *Mut. L. Ins. Co. v. Bigler*. 568

3. The petition of the purchaser in such a case showed that the mortgagor was threatening to remove certain machinery from a mill upon the premises, which machinery the petitioner claimed to be part of the realty. *Held*, that an order restraining the mortgagor from removing the machinery until the confirmation of the report of sale and the receipt of the deed by the purchaser was proper; but that it was not necessary to adjudge the question as to whether the articles of machinery were fixtures passing with the land; that this was a question which should not be adjudged summarily on a motion. Leave therefore granted to either party to bring an action to determine that question. *Id.*

— *As to sale by commissioner for loaning moneys of the United States.*
See Thompson v. Loan Com'rs. 54

See MORTGAGE.

SURPLUS MONIES.

FORMER ADJUDICATION.

1. E. plaintiff's testator, defendant and one S. entered into a co-partnership in 1865, "for so long a time as they shall mutually agree," E. to receive one-tenth, defendant four-tenths and S. five-tenths of the net profits. For the year 1872, E. received a greater proportion, defendant a less, S. the same. On January 1, 1873, defendant executed an instrument by which he agreed to pay E. "four and three-eighths per cent of the net ascertained profits" of the firm "during the year 1873." E. remained in the firm, receiving during the year the share of profits stated in the original agreement. In an action upon the instrument it appeared that upon the death of S. defendant brought an action for an accounting and settlement of the partnership affairs. E. set up in his answer therein that he was entitled, for the year 1873, by agreement, to a greater percentage of profits than that specified in the co-partnership agreement. On the trial he offered in evidence the instrument above described, which was rejected. *Held*, that the former action was no bar to this; that the undertaking of defendant was an individual one having no relation to the partnership or its affairs, as such. *Emery v. Wilson.* 78
2. An estoppel by judgment in a former action arises when the same matter was at issue therein, and was either litigated by the parties and determined, or it might have been litigated and a decision had upon it. *Smith v. Smith.* 634
3. It is not necessary that it shall appear by the record of the prior suit that the particular controversy sought to be precluded was then necessarily tried and determined; it is sufficient if there might have been judgment in the first action for the same cause alleged in the second. *Id.*
4. An estoppel by a former action, effectual as between the parties, arises also in favor of or against those in privity with them. *Id.*
5. Whether the matter might have been tried in the former action must appear from the record; if it does so appear, oral testimony is competent in the second action to show that it was litigated, passed upon and determined. *Id.*
6. A judgment in ejectment is only conclusive, under the statute (2 R. S., 235, § 36), as to the title litigated and established in the action; it is not the recovery which constitutes an estoppel in a subsequent action, but the decision of the question which was in contestation between the parties. *Dawley v. Brown.* 390

— *A judgment in an action to set aside a tax, for an installment of an assessment because of irregularity therein, a bar to a subsequent action to set aside tax for another installment; also what is required to make former adjudication a bar.*
See Guest v. City of B. 624

FORMER SUIT PENDING.

1. The requirement that to sustain a plea of a former action pending it must appear to the court that the first action was for the same cause as the second, is to be strictly enforced, it is not enough that the property in controversy in both actions is the same. *Dawley v. Brown.* 390
2. The rule is the same in actions of ejectment. *Id.*
3. A judgment in ejectment is only conclusive, under the statute (2 R. S., 235, § 36), as to the title litigated and established in the action; it is not the recovery which constitutes an estoppel in a subsequent action, but the decision of the question which was in contestation between the parties. *Id.*
4. So, also, in case of a plea of former suit pending in an action of ejectment, the point is whether the same title is sought to be litigated in both actions; if not, the former action is not a bar. *Id.*

FRAUD.

1. Where a sale of goods has been induced by fraud on the part of the vendee, the vendor may reclaim and retake them from the possession of any one, except a transferee in good faith, and for a valuable consideration paid at the time of the transfer. *Stevens v. Brennan.* 254
2. A transfer by the fraudulent purchaser, as security for or in payment of a precedent debt, does not make the transferee a *bona fide* purchaser within the rule, so as to enable him to hold the goods against the original vendor. *Id.*
3. In a suit by such vendor to recover the goods from one claiming title under the fraudulent vendee, the burden is upon the latter of showing that he is a purchaser in good faith and for value. *Id.*
4. H. Bros., induced by fraudulent representations of S., sold to him a quantity of furniture, which was retaken by B., defendant's intestate, as sheriff, by virtue of a requisition in an action of replevin, brought by the vendors against the fraudulent vendee. In an action for the alleged unlawful taking and conversion of the property, plaintiffs' testator claimed title under a bill of sale from S. and wife which recited a consideration. No other proof of consideration was given. Defendant proved by the wife of S. that no consideration was paid at the time the bill of sale was executed, and the only inference if any which could be drawn from the testimony was, that the bill of sale was taken in payment or as security for a precedent debt. *Held*, that the complaint was properly dismissed; that if the recital in the bill of sale was any evidence as against the sheriff or H. Bros., the evidence of Mrs S. destroyed any presumption arising therefrom. *Id.*

See FRAUDULENT CONVEYANCES.
STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

1. A purchaser, for a valuable consideration, is not chargeable with constructive notice that the conveyance to him was made by his vendor with intent to defraud creditors; actual notice is required to impair or affect his title. (2 R. S., 137, § 5.) *Stearns v. Gage.* 103
2. M., being insolvent, conveyed to his son F., who was then a man of no means, his farm, which was worth from \$10,000 to \$11,000. F. was then twenty-six or twenty-seven years old; after he became of age he continued working on the farm under no express agreement, except for a year previous to the conveyance, when he worked it on shares. The farm was conveyed subject to a mortgage of \$4,000. F., to secure a portion of the purchase money, gave back a mortgage of \$3,500, and \$1,500 was agreed upon and allowed for the services of F., after he became of age, and for his share of the proceeds of the farm for the last year, which M. had received. F. also gave to M. a note for \$500, and executed a written agreement, by which, for an expressed consideration of love and affection and of \$100, he agreed to support M., and to pay him \$500 on demand, in case he should think it the duty of F. so to do. By another writing, executed about six weeks thereafter, M. conveyed to F. all his farming utensils and farm property in consideration of \$1,200, for which F. gave his notes. In an action by judgment creditors of M. to set aside the deed as fraudulent, *held*, that the facts authorized a finding that in and by the transaction the parties intended to hinder, delay and defraud the creditors of M.; and so, that the deed was void. *Id.*
3. F. subsequently conveyed the farm to L., his uncle, for \$12,000, which the grantee paid. There was no proof of actual knowledge on the part of L. of the fraudulent intent in the first transaction. The

referee found that L. knew M. was embarrassed, but supposed him good at the time of his conveyance; that L. knew of the agreement for the support of M.; that before the conveyance to himself he, as administrator of M., took an inventory of his personal estate, and from the claims presented, knew that M. was insolvent at the time he conveyed; also, that he knew of the pecuniary circumstances of F. at that time. L. testified that he understood F. paid \$10,000, besides the agreement to support his father; that he had no design to hinder, delay or defraud, and did not know and had not been informed at the time he purchased that M. had any such design when he conveyed. *Held*, that the facts were insufficient to charge L. with constructive notice of the fraudulent intent on the part of M.; also that constructive notice was insufficient, actual notice was required to affect or impair the title of L. *Id.*

4. Upon a reference as to surplus moneys in a foreclosure suit, the referee has authority to inquire as to the validity of conveyances or liens; and conveyances, as well as liens, may be attacked as fraudulent. *Bergen v. Carman.* 146

5. Where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser has the right to impeach the conveyance upon such a reference; he is not bound to bring ejectment, or an action to set aside the conveyance. *Id.*

6. The maker of a promissory note, in an action thereon by a transferee, cannot assail plaintiff's title on the ground that the transfer was made in fraud of the creditors of the payee; the transfer can only be assailed on that account by the creditors or some one representing them. *Sullivan v. Bone-steel.* 631

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

GENERAL TERM.

Under the Code of Civil Procedure (§ 1338), where an order of General Term, reversing a judgment entered upon the report of a referee, does not state that it was made on questions of fact, it will be deemed to have been made on questions of law only. *Weyer v. Beach.* 409

GOOD WILL.

1. Plaintiff and defendant were formerly partners in business, as dentists, under the firm name of "Morgan & Schuyler." Upon the dissolution of the firm defendant bought plaintiff's interest in certain firm property, and became equitable assignee of the unexpired term of the lease of the room occupied by the firm, in which he continued the business, using signs bearing his name, followed by the words "successor to Morgan & Schuyler." There was nothing in the agreement of dissolution prohibiting plaintiff from engaging in the business, and it was understood at the time between the parties that he was to open an office for that purpose in another part of the city, which he did. In an action to restrain defendant from using plaintiff's name, *held*, that defendant did not acquire, by the agreement of dissolution, any good will in the business, except such as was incident to his sole ownership of partnership property, and his exclusive right to occupy the rooms of the late firm; that he was not authorized to use the firm name, or to declare himself "successor to " the late firm; and that, therefore, the action was maintainable. *Morgan v. Schuyler.* 490

2. *It seems*, that defendant would have the right to describe his rooms as those formerly occupied by "Morgan & Schuyler," and himself as formerly, or late of that firm. *Id.*

GOODS SOLD AND DELIVERED.

— *When proof of agreement to transfer interest will not sustain action for.*

See Harris v. Kasson. 381

GRANTOR AND GRANTEE.

1. One who purchases a part of mortgaged lands, and agrees with his grantor to assume and pay the whole mortgage, may discharge his land from the consequences of that assumption, by agreement made with his grantor while the latter is still the owner of the residue, and a grantee of the residue, after such discharge, cannot claim the benefit of the assumption. The grantee succeeds only to the equities of his grantor, existing at the time of the conveyance, and that without regard to any question of notice. *Judson v. Dada.* 373

2. Defendant A. being the owner of certain premises, subject to a mortgage then on record, sold and conveyed a portion thereof to D. and M., which, as stated in the deed, was "supposed to be eighty acres," the grantor covenanting that in case of a deficiency she would pay therefor at the rate of thirty dollars per acre; the grantees, as the consideration for the conveyance, assumed and agreed to pay the whole mortgage; subsequently, it having been ascertained that there was a deficit in quantity of the land conveyed, A. executed to her said grantees a writing agreeing that she would save them harmless, to the amount of \$273.32, the sum agreed to be paid for such deficit, from any claim under the mortgage. A. subsequently conveyed the residue of the premises to other parties, covenanting that the same was free and clear of all incumbrances. In an action to foreclose the mortgage, *held*, that the grantees of such residue were entitled to no other or greater equities than those which A. had at the time she conveyed; that the residue was presumably chargeable in equity with the payment of \$273.32 of the mortgage,

and the portion so conveyed to D. and M. was chargeable with the balance; that the fact that the covenant of D. and M. to pay the mortgage was contained in a deed on record was immaterial; as were also the facts that the agreement of A. to re-assume the amount of the rebate for the deficiency, was not on record, and that the grantees of the residue had no notice thereof. *Id.*

3. Such an agreement is not within the recording act. *Id.*
4. As to whether the personal liability incurred by the first grantees to the holder of the mortgage, by assuming its payment, could be discharged by subsequent agreement between them and their grantor, *quære.* *Id.*
5. So, also, *quære*, as to whether sufficient was not disclosed in the first deed to put the subsequent grantees upon inquiry, and charge them with constructive notice of the release by A. of the covenant of D. and M. to the extent of the value of the deficit, in case a notice was necessary. *Id.*

HEALTH.

The only power conferred upon the board of health by the provisions of the act of 1871, "to provide for the proper drainage of lands," in the city of New York (chap. 566), is to direct the drainage of land by means other than sewers, where surface water, injurious to public health, could not be carried off by the sewers; and to assess the expense upon lands benefitted by the drain, the area of assessment being restricted to the lands between the drain and the adjacent streets and avenues. *In re Pet. Van Buren.* 384

HIGHWAYS.

1. Where a highway bridge in the town of G. was carried away by a flood shortly prior to the town meeting of 1873, *held*, that the commissioners of highways of the

town, with the consent of the board of town auditors, were authorized to enter into a contract for the rebuilding of the bridge, under the provisions of the act providing for "the speedy construction and repair of roads and bridges," etc. (§ 1, chap. 103, Laws of 1858, as amended by chap. 442, Laws of 1865), which authorizes the commissioners of highways of a town, with such consent, where a bridge has been damaged or destroyed after a town meeting, to cause the same to be immediately repaired or rebuilt *Boots v. Washburn*. 207.

2. Also, *held*, that the commissioners were authorized to contract to pay for the bridge upon the completion thereof, although they had no money in their hands for that purpose. *Id.*

3. *It seems*, that in such case the commissioners have power, under said statute, to borrow money upon the credit of the town to pay for the bridge. *Id.*

4. In an action upon such a contract, it appeared that the consent of the board of town auditors to the rebuilding of the bridge was given at its regular annual meeting, when all the members of the board were present; it did not appear whether the consent was in writing or not. *Held*, that, if requisite, it would be assumed that a record of the consent was properly made. *Id.*

5. There were three commissioners of highways of the town, all of whom united in the determination to rebuild the bridge, and in the application to the board of auditors; also in the agreement upon the plan, and that the work should be by contract, the letting to be advertised. At the time the contract was let and entered into, one of the commissioners was absent, he not having received actual notice in time to attend; his name was signed to the contract by one of the other commissioners, who previously, by his consent, had signed his name to the advertisement; he afterwards, with knowl-

edge of the facts, acted with the other commissioners in reference to the bridge without any objection, and never questioned the validity of the contract. *Held*, that the contract was to be treated as the valid contract of the three commissioners. *Id.*

6. The complaint in the action set forth the contract, in which the defendants were described as commissioners, and that they signed it as such; they were not described in the summons and complaint as commissioners, and judgment was asked against them personally. *Held*, that plaintiff was properly nonsuited, because defendants were not sued officially as commissioners; that under the statute providing for actions upon such contracts (2 R. S., 473, § 92) it was necessary to specify "in the process, pleadings and proceedings their name of office;" that the statutory requirement was not merely formal, but matter of substance, to the end that the amount collected might be allowed in the official account of the commissioners (2 R. S., 476, § 108); also as it affected the place of trial. *Id.*

HOTELS.

1. By plaintiff's charter (chap. 432, Laws of 1871) it was provided that the franchises thereby granted should become null and void unless it should begin the construction of a hotel within two years after the passage of the act; it was also made "subject to the liabilities and restrictions contained in certain provisions of the Revised Statutes," among others to the provision (1 R. S., 600, § 8) declaring that the charter of every corporation thereafter "granted by the Legislature shall be subject to alteration, suspension or repeal, in the discretion of the Legislature." Defendant subscribed for fifty shares of the capital stock. Subsequently, but before the expiration of the two years, the charter was amended (chap. 123, Laws of 1873) by extending the time for beginning the construction of the hotel five years. The work of con-

struction was not commenced within the two years, and soon after defendant gave notice to plaintiff that he withdrew his subscription. In an action upon the subscription, *he'd*, that the said provision of the Revised Statutes was to be considered as incorporated in the charter, and as part of defendant's contract; and that the subscription was not defeated by the amendment. *Un. Hotel Co. v. Hersee.* 454

2. Defendant's subscription was made on the condition that "the sum of \$200,000 be subscribed by the citizens of Buffalo." The requisite amount was subscribed; some of the subscriptions were in firm names written by one partner; one was in the name of a corporation; it appeared that this was made by authority of the directors of the corporation, and with the assent of all the stockholders. Upon these subscriptions payments were made in compliance with calls made upon the subscribers. *Held*, that the evidence established *prima facie* the validity of these subscriptions; that, in any event, the payment upon each was a ratification thereof. *Id.*

3. One of the subscribers had, at the time of his subscription, his domicile in Batavia, but boarded in Buffalo, was engaged in business and spent nearly all of his time there. *Held*, that he was a citizen of Buffalo within the meaning of the subscription paper. *Id.*

4. Another subscription was in the name of "B. & S. M. Spencer." B. Spencer, who signed, was a resident of Buffalo. *Held*, that the subscription was within the terms of the contract; and this, although there was no such firm, or B., signed without authority, as in either event he would be liable as upon his individual subscription. *Id.*

INDICTMENT.

1. The Supreme Court may, upon application of the prosecution, issue a writ of certiorari, to remove an indictment into that court from

the Oyer and Terminer. *Jones v. People.* 45

2. As to whether a certiorari may be brought for that purpose without the assent and in spite of the authority of the Supreme Court, *quære.* *Id.*

3. It is not necessary to give notice of application for the writ. *Id.*

4. It is discretionary with the Supreme Court after having obtained jurisdiction of the case either to quash the writ upon cause shown, to remand the case to the Oyer and Terminer, or to proceed to its disposition as in other cases pending before it. *Id.*

5. An indictment charged perjury in evidence given by the accused on the trial of a civil action before a referee; the indictment did not allege, in terms, the commencement and pendency of the civil action; it charged that a referee was duly appointed in an action then pending in the Supreme Court of this State, naming the parties. *Held*, that this was a sufficient averment to show that the court had jurisdiction of the parties. *Eighmy v. People.* 547

6. The indictment charged that the referee was "duly and legally appointed in the action" by a justice of said court, "by an order duly made * * * in said action at the chambers of said justice;" also that the referee was "duly authorized and qualified to perform the duties of that office." It was objected that the indictment was defective, as it did not state that the order of reference was made by the court, but set up an *ex parte* chamber order. *Held*, untenable; that it was to be presumed the justice acted in accordance with law, and as he had a right to hold Special Term at his chambers, and as the appointment was alleged to have been lawfully made, the legitimate inference was that the order was made at Special Term. *Id.*

7. It is not necessary, in an indictment charging perjury committed

before a court of general jurisdiction, to set out all the facts showing jurisdiction; an averment that the court had sufficient and competent authority to administer the oath will suffice. *Id.*

8. Also, *held*, that proof of the entry of the order of reference was not required, the granting of the order gave the referee jurisdiction. *Id.*

INFANTS.

1. Where a legacy to an infant, as to whom the testator is *in loco parentis*, is made payable when the infant becomes of age, and such legatee has no other provision in the meantime, or any maintenance allotted by the will, the legacy carries interest from the time of the death of the testator. *Brown v. Knapp*. 136
2. It is not needed for the application of this rule that the testator should have been under a legal obligation at the time of his death to support the legatee; it is sufficient that he has voluntarily assumed such a relation, similar in some respects to that of parent, as that it may be presumed he did not intend to leave the legatee without support. *Id.*
3. Plaintiff's father, who was the son of B., the testator, entered the military service of the United States in 1863. Before he entered the service B. said to him, that if he never returned his wife and son would always be cared for. After his departure B. took plaintiff and his mother to his (B.'s) house to live. Plaintiff's father died in the service; plaintiff and his mother continued to live with B., being supported by him until his death; plaintiff was at that time about seven years old. By his will B. gave to plaintiff \$3,000, which he directed his executor to pay when plaintiff attained the age of twenty-one years. The residue of his "real and personal estate" B. gave to his son W., whom he appointed executor. W. qualified and took possession of the estate.

Plaintiff had no property, except that given him by the will. *Held*, that the evidence authorized a finding that the testator assumed the paternal care of plaintiff; that he was entitled to interest upon the legacy at the rate of six per cent per annum from the death of the testator, during his minority; and that W. was personally liable therefor. *Id.*

4. Under the provisions of the Revised Statutes, in relation to the sale of the real estate of infants (3 R. S., 194, § 170, *et seq.*), it is not essential that the infant should join in the petition for such sale; it may be made by the next friend or guardian alone. *Cole v. Gourlay*. 527
5. The rule of the Court of Chancery (rule 15S), requiring an infant to join when he is over fourteen years of age, was a mere regulation of practice, which the court had power to waive, and did not affect the jurisdiction or invalidate a sale under the proceedings. *Id.*
6. So, also, said court had power to dispense with the provision of said rule, requiring corroborating affidavits, and with that requiring the petition to be by the general guardian of the infant or to show that he has none. *Id.*
7. Where a petition shows that the application was made for and on behalf of the infants, by one entitled to represent them, as provided in said statute, and is in conformity with its requirements, this is sufficient. *Id.*
8. An order of the Court of Chancery in such proceedings adjudged that the special guardian who signed the petition should execute a sufficient conveyance of the interest of the infants; a deed was executed by him in his own name as special guardian; the names of the infants appeared in the deed. *Held*, that the deed was in proper form; that it was not necessary to have it executed in the name of the infants. *Id.*

INJUNCTION.

1. Where the bonds of a town have been issued to a railroad corporation, in payment for stock, by commissioners appointed under and by a judgment, void for want of jurisdiction, rendered in proceedings under the act authorizing "municipal corporations to aid in the construction of railroads" (chap. 907, Laws of 1869), an equitable action is maintainable, under the act of 1872, for the protection of tax-payers, etc. (chap. 161, Laws of 1872), at the suit of a tax-payer of the town, to restrain the negotiation or payment of the bonds, and to compel their cancellation. *Metzger v. At. and Ar. R. R. Co.* 171
2. Plaintiff and defendant were formerly partners in business, as dentists, under the firm name of "Morgan & Schuyler." Upon the dissolution of the firm defendant bought plaintiff's interest in certain firm property, and became equitable assignee of the unexpired term of the lease of the room occupied by the firm, in which he continued the business, using signs bearing his name, followed by the words "successor to Morgan & Schuyler." There was nothing in the agreement of dissolution prohibiting plaintiff from engaging in the business, and it was understood at the time between the parties that he was to open an office for that purpose in another part of the city, which he did. In an action to restrain defendant from using plaintiff's name, *held*, that defendant did not acquire, by the agreement of dissolution, any good will in the business, except such as was incident to his sole ownership of partnership property, and his exclusive right to occupy the rooms of the late firm; that he was not authorized to use the firm name, or to declare himself "successor to" the late firm; and that, therefore, the action was maintainable. *Morgan v. Schuyler.* 490
3. In an action for the foreclosure of a mortgage, after judgment, and a sale in pursuance thereof, and while awaiting the confirma-

tion of the court for the payment of the purchase-money and the delivery of the deed, the court has authority on the petition of the purchaser to restrain the mortgagor from committing waste. *Mutual Life Ins. Co. v. Bigler.* 568

4. The petition of the purchaser in such a case showed that the mortgagor was threatening to remove certain machinery from a mill upon the premises, which machinery the petitioner claimed to be part of the realty. *Held*, that an order restraining the mortgagor from removing the machinery until the confirmation of the report of sale and the receipt of the deed by the purchaser was proper; but that it was not necessary to adjudge the question as to whether the articles of machinery were fixtures passing with the land; that this was a question which should not be adjudged summarily on a motion. Leave therefore granted to either party to bring an action to determine that question. *Id.*

INSANE PERSONS.

1. *It seems*, that an obligation entered into by an insane person to repay money loaned, of which he had the benefit, is valid where the lender acted in good faith, without fraud or unfairness, and without knowledge of the insanity or notice or information calling for inquiry; and an action is maintainable thereon. *Mutual Life Ins. Co. v. Hunt.* 541
2. The fact that the borrower was subsequently, upon inquisition taken, declared to be insane, does not affect the right to recover. *Id.*

INSURANCE (FIRE).

1. Defendant issued to O., its general agent, an open or underwriters' policy of insurance, which contained a condition, that if the interest of the insured be other than the entire and sole ownership, it must be so represented to the

company, and so expressed in the written part of the policy, otherwise it would be void. O. issued to B. & Co. two certificates of insurance, which were indorsed upon the policy, upon wheat in their elevator; in one, loss if any, payable to whom it may concern; in the other, loss payable to R. Previous to obtaining the insurance R. had discounted drafts, drawn by B. & Co. upon him, receiving as security warehouse receipts of specified quantities of wheat in said elevator. After a loss B. & Co. assigned the certificates to R. In an action thereon defendant set up, as a defense, a breach of said condition. The case on appeal did not contain the evidence, but simply stated that certain facts were proved. There was no suggestion therein as to whether or not any representations were made by B. & Co., as to the nature of their interest, no request to find, and no findings upon that subject; the only exceptions were to the findings as made. The court, by whom the cause was tried, found that all the conditions of the policy had been duly kept and performed. The General Term reversed the judgment on the ground that there was a breach of this condition. *Held*, error; that it did not appear from the bill of exceptions, that this question was litigated upon the trial, and there was no exception enabling the court to consider it on appeal; that the burden of proving a breach of the condition was upon defendant; that if B. & Co., when the insurance was procured, informed O. of the nature of their interest, and he omitted to describe it in the policy, defendant would be deemed to have waived the condition, and it could not be assumed that this was not done. *Richmond v. Nia. F. Ins. Co.* 230

2. It was claimed by defendant that B. & Co. had, prior to the insurance, issued warehouse receipts, covering a larger quantity of wheat than there was at the time of the insurance in the elevator, and that they had therefore no insurable interest. No fraud was

claimed, and it appeared that the whole insurance was less than the value of the wheat in the elevator. The case stated that it was proved that B. & Co. were the owners of the wheat, and it was so found. *Held*, that assuming B. & Co. had parted with the title to the wheat by force of warehouse receipts, before the receipts to R. were executed, they occupied at least the position of warehousemen, and so had an insurable interest; but that the finding of ownership could not be questioned here. *Id.*

3. The policy contained a provision avoiding it, in case the assured had at the time of insurance, or thereafter made, other insurance without the consent of the company written thereon. There was, at the time the insurance in question was effected, other insurance, which was not consented to in writing. It appeared that the other insurances were effected through O., and were known to him to be in existence when the insurance in question was made. *Held*, that, under the circumstances, the issuing of the insurance by O., without noting a written consent to the other insurance, was a waiver of the provision, binding upon the defendant. *Id.*

4. In an action upon a policy of fire insurance, it appeared that when the issuing of the policy was reported to defendant by its agent, it at once notified him to cancel the policy, unless the "average clause" was inserted; this notice did not reach the agent until after the fire. On the trial defendant's counsel asked one of its witnesses whether "an average clause in a policy is favorable or unfavorable to an insurance company." This was objected to and excluded. *Held*, no error. *Standard Oil Co. v. Amazon Ins. Co.* 506

INSURANCE (LIFE).

1. In an action to procure the cancellation of a policy, of life insurance, the complaint alleged that the policy was obtained by fraud

and conspiracy between plaintiff's agent and the insured; that the premium was not paid in cash, as required by the policy, but by the note of the insured, and was delivered to the latter when he was sick, of which sickness the insured died. The complaint also averred that the plaintiff feared the holder of the policy would commence an action thereon, and by collusion with said agent obtain an appearance on its behalf, and from failure to answer, or to duly defend the action, obtain a judgment without plaintiff's knowledge, thus preventing plaintiff from presenting its defense, or that defendants would delay bringing an action until the evidence of fraud and conspiracy was lost. The referee found that there was no fraud; the other facts were found substantially as alleged in the complaint. *Held*, that the complaint was properly dismissed. *Globe Mut. L. Ins. Co. v. Reals.* 202

2. A receiver of an insolvent life insurance company may, at any time, apply to the court for instructions in regard to any matter touching the fund placed in his custody. Especially is this so where the fund, through his error, is in danger of being unfairly distributed. *In re Pco. ex rel. v. Secur. L. Ins. and An. Co.* 267

3. The receiver owes a like duty to all claimants upon the fund; and it is his duty, as far as possible, to see that each has an equal opportunity to enforce his claim. *Id.*

4. A receiver of such a company obtained an order as prescribed by statute (2 R. S., 467, § 56), for publication of notice to creditors, requiring them to exhibit their claims within a time specified. Before the expiration of the time the receiver addressed a circular to policy-holders, to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further proof; misled by such circular the holders of such policies did not make proof of their claims. These were objected to by other creditors, and were rejected by the

referee to whom it was referred to take proof as to distribution of the assets. Whereupon, and before any dividend had been made, the receiver applied for and obtained an order giving two months further time within which such claims could be presented and established before the referee. *Held*, that the receiver was authorized in making the application; that the court had power, in its discretion, to grant it; and that the exercise of this discretion was not reviewable here. *Id.*

5. The power and discretion of the court in reference to publication of notice in such case, may be exercised to the same extent as in other proceedings or actions, save that the notice must be for "not less than six months" (§ 56); and the power of the court is not exhausted by making one order. *Id.*

INTEREST.

— *When interest is recoverable upon a legacy, and at what rate.*
See Brown v. Knapp. 136

— *When surviving partner entitled upon accounting to interest on advances.*
See Collender v. Phelan. 866

INTERROGATORIES.

See COMMISSION (TO TAKE TESTIMONY).

JUDGMENT.

1. Where, in a proceeding under the general lien law (chap. 402, Laws of 1854, as amended by chap. 558, Laws of 1869, and chap. 489, Laws of 1873), to foreclose an alleged mechanic's lien, it appears that no lien ever existed, a personal judgment cannot be rendered against the owner of the premises upon an independent contract between him and the claimant. *Weyer v. Beach.* 409

2. The proceeding being statutory can only be resorted to in a case falling within the statute, i. e.,

where a mechanic's lien exists. The power to render a personal judgment is merely incidental to the main purpose, and where it appears that no lien ever existed the whole proceeding falls. *Id.*

3. As to whether, under said act, any personal judgment can be rendered, except for a deficiency, *quære.* *Id.*

4. In an action for an accounting, brought by the executors of a deceased partner against the surviving partner of a firm, a judgment was rendered directing defendant to pay over to a receiver a specified sum, and to turn over to him the partnership assets remaining, out of which the receiver was directed to pay plaintiffs, a sum stated, and to divide the residue; thereupon a judgment was docketed in favor of plaintiffs, against defendant, for the amount the latter was required to pay; on motion to vacate the docket in this particular, *held*, that it was not authorized by the judgment, and was properly vacated; that the docket, if any was authorized, should have been in favor of the receiver; that it was not sufficient that it appeared, plaintiffs would be entitled to as large or a larger sum when the judgment is fully carried out; there was no personal money judgment between the parties, the money required to be paid the receiver was partnership money, and the demand of plaintiffs was to be paid by the receiver from firm assets. *Geery v. Geery.* 565

See FORMER ADJUDICATION.

JUDICIAL SALES.

— *Validity of sale of real estate of infants*
See Cole v. Gourlay. 527

JURISDICTION.

1. The Supreme Court having under the State constitution (art. 6, § 6), general jurisdiction of law and equity, its jurisdiction cannot be limited either by the Legislature,

or by any power conferred by it upon the court itself. *People ex rel. Mayor, etc. v. Nichols.* 582

2. The provision of the act of 1879, extending the jurisdiction of Courts of Special Sessions (chap. 300, Laws of 1879), which gives to said courts exclusive jurisdiction, in the first instance, to hear and determine, among other things, "charges for assault and battery, not alleged to have committed riotously," did not oust Courts of Sessions of jurisdiction to try pending indictments for that offence; it applies only to charges made subsequent to the passage of the act. *Ryan v. People.* 593

3. *It seems*, that the word "charges" implies an original complaint, made in the first instance, preliminary to a formal trial for a crime, it does not include indictments. *Id.*

4. This court does not lose jurisdiction of a cause brought here upon appeal until the remittitur has been filed in the court below, and that court has taken some action thereon. *People ex rel. Smith v. Village of Nelliston.* 638

5. Accordingly *held*, that the court had jurisdiction to make an *ex parte* order, correcting a remittitur, which had been filed with the clerk of the court below; but upon which no action had been taken in that court. *Id.*

— *Of court, in directing proceedings of receiver of insolvent life insurance company.*

See In re Atty.-Genl. v. Secur. L. Ins. and An. Co. 257

— *Special Term has jurisdiction to hear motion for judgment on return to writ of certiorari, in proceedings before the mayor to remove officers, under charter of the city of New York of 1873 (§ 25, chap. 335, Laws of 1873).*

See People ex rel. v. Nichols. 582

LANDLORD AND TENANT.

See LEASE.

LEASE.

A lease under seal, drawn technically in form, and with obvious attention to details, contained various covenants, some binding the parties mutually, some the lessor only, others the lessee. It contained a covenant, on the part of the lessor, to the effect that if the lessee should pay the rents, and perform all the covenants on his part, that the lessee "shall and will at the end or expiration of the term," grant to the lessee a new lease for a further term specified, at a rent to be adjusted by appraisers, but not less than that for the first term. In an action to compel the lessee to accept a new lease, *held*, that this was a covenant, on the part of the lessor only, from which no covenant, on the part of the lessee, to take a new lease, could be implied; and that it was optional with him, whether or not, to take a new lease. *Bruce v. Fulton National Bank.* 154

— *Covenant of sublessee to pay mortgage executed by original lessee, construed.*

See Hume v. Hendrickson. 118

— *Effect of as an estoppel from questioning landlord's title.*

See Territt v. Cowenhoven. 400

LEGACIES.

1. Where a legacy to an infant, as to whom the testator is *in loco parentis*, is made payable when the infant becomes of age, and such legatee has no other provision in the meantime, or any maintenance allotted by the will, the legacy carries interest from the time of the death of the testator. *Brown v. Knapp.* 136

2. It is not needed for the application of this rule that the testator should have been under a legal obligation at the time of his death to support the legatee; it is sufficient that he has voluntarily assumed such a relation, similar in some respects to that of parent, as that it may be presumed he did not intend to leave the legatee without support. *Id.*

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3. Where a legacy is given, and is directed to be paid by the executor, who is a devisee of real estate, such estate is charged with the payment of the legacy; and the devisee, upon accepting the devise, becomes personally bound to pay the legacy; and this, although the land devised to him proves to be less in value than the amount of the legacy. *Id.*

4. *It seems*, that payment of such a legacy may be enforced by a suit in equity against the real estate, or by an action directly against the devisee upon the promise to pay implied by the acceptance of the devise. *Id.*

5. An action to enforce the legal liability of the devisee and executor may be brought in this State, although the testator was a resident of, and said executor was appointed in another State. *Id.*

6. In such case, however, where action is brought to recover interest during the minority of the legatee, as the cause of action arose in the other State, the rate of interest allowed by its laws should control. *Id.*

7. In such an action, *held*, that plaintiff was not entitled to recover compound interest, but only simple interest at the rate of six per cent. *Id.*

LEGISLATION.

1. Where an appropriation, within the power of the Legislature is made by it, no inquiry is admissible as to the reasons, or information upon which it acted. *People ex rel. Sage v. Schuyler.* 189

2. Where a work of public necessity is done under an invalid contract, or even voluntarily, without the authority of any public officer, and the Legislature appropriates money to pay for it, a disbursing officer cannot refuse to apply the money to the purpose for which it was appropriated, on the ground that the State was not originally under any legal obligations to

make payment, or that the Legislature was not sufficiently informed of the facts; the only question for such officer is whether the appropriation was for the purpose claimed; when this is ascertained his duty is ministerial only. *Id.*

LIEN.

— *Of mortgages, priority of, under recording act.*

See Westbrook v. Gleason. 23

— *Of assessments, when action may be brought to remove.*

See Curnen v. The Mayor. 511

— *When action cannot be brought to remove lien of assessment.*

See Guest v. City of B. (Mem.) 624

See MECHANIC'S LIEN.

LIMITATION OF ACTIONS.

1. In an action to recover a balance alleged to be due upon a store account, for goods sold and delivered, where the defense was the statute of limitations, it appeared that defendant had delivered to plaintiff small quantities of butter and eggs at different times to be credited upon the account. *Held*, that the action was "upon a mutual, open and current account, where there have been reciprocal demands between the parties," within the meaning of the provision of the Code of Procedure (§ 95*) which declares that in such case the cause of action shall be deemed to have accrued from the time of the last item proved; and that as the last item was within six years the claim was not barred. *Green v. Disbrow.* 1

2. The words "reciprocal demands" in said provision mean no more than "mutual accounts" as used in the former statutes. *Id.*

3. An account of items on one side and payments on the other is not a mutual account; but when goods are delivered by a debtor to a creditor having an account against him it will not be presumed that they

are delivered in payment; before they can be held to have been so delivered there must be proof that it was intended, and that both parties so understood it. *Id.*

4. It is not essential in order to make an account of mutual or reciprocal demands that each party shall have an independent cause of action against the other for his side of the account; the cause of action is only for the balance, and that party is only the debtor against whom the balance is found. *Id.*

5. The history of the statutory provisions upon this subject given, and the authorities thereon, collated and discussed. *Id.*

6. The provisions of the Revised Statutes (2 R. S., §§ 34, *et seq.*) in reference to publication by executors and administrators of notice to those, having claims against the deceased, to exhibit them, and the provision (§ 38) limiting the time for commencing suits upon claims disputed or rejected, include claims which are contingent, as well as those where the liability is certain and fixed. *Cornes v. Wilkin.* 129

7. Plaintiff and B., defendant's testator, were co-sureties upon an undertaking given on appeal; the judgment appealed from was affirmed July 5, 1873; an action was commenced against plaintiff August 28, 1873; judgment was perfected therein against him September 17, 1873, which he paid November 11, 1873. Defendant obtained an order for the publication of notice to creditors September 13, 1873, and such notice was on that day published. Plaintiff served upon defendant a claim for contribution. April 15, 1874, which was immediately rejected. This action upon such claim was commenced November 27, 1876. *Held*, that the six months limitation, prescribed in said statute, applied to the claim; that the fact that the first publication of notice was prior to the establishment of plaintiff's liability was immaterial; and that the action was barred. *Id.*

8. Defendant, in May, 1874, wrote to plaintiff's attorney, offering to submit the controversy under section 872 of the Code of Procedure; said attorney wrote a letter in March, 1876, accepting the proposition, to which defendant made no reply. *Held*, that the offer was not a waiver of the statute; that to constitute a waiver the offer should have been accepted within the six months, and this followed by an actual submission. *Id.*

9. Where a trustee of a manufacturing corporation has become liable for a debt of the corporation, because of failure to make and file an annual statement as required by the statute (§ 12, chap. 40, Laws of 1848), the statute of limitations then begins to run as to that debt, and the right of action is barred in three years thereafter, although the default is continued during successive years; the continuance of the default does not revive the liability or create a new one. *Loose v. Bullard.* 404

LOAN COMMISSIONERS.

1. A sale under a mortgage, given pursuant to the act, "authorizing a loan of certain moneys belonging to the United States" (chap. 150, Laws of 1837), being a statutory proceeding, a failure to comply with the provisions of the statute, renders the sale void. *Thompson v. Loan Comrs. Otsego Co.* 54

2. The advertisement of sale must indicate who executed the mortgage, and to whom it was given. *Id.*

3. Commissioners appointed under said act, in case of default in payment as specified therein, become seized as trustees only, subject to the possession and the right of the mortgagor to redeem, until a legal sale is made in conformity with the statute. *Id.*

4. Where a published notice of sale under such a mortgage omitted the name of one of the mortgagors, and stated that the mortgage was given to "the Commissioners of the

United States Deposit Fund," instead of "the Commissioners for loaning certain moneys of the United States," as stated in the mortgage, and as designated by the statute. *Held*, that the notice was defective and the sale illegal; and that the mortgagors were thereafter entitled to redeem. *Id.*

5. After such an illegal sale a mortgagor served upon the commissioners a notice in writing, offering to pay the amount of the mortgage, principal and interest, and to redeem the premises; also stating therein that she desired an accounting of the rents and profits, possession having been taken by the purchaser. The commissioners made no answer. In an action to redeem, *held*, that the omission to make tender was not fatal to the action, but that in any event it only affected the question of costs; that the plaintiff in such an action occupied the same position as any other mortgagor seeking to redeem; also, that plaintiff was entitled to an accounting from the purchaser and his successors in interest and possession for the rents and profits. *Id.*

6. Also, *held*, that such an action, with all the parties brought in, was the proper remedy in such case. *Id.*

LONG ISLAND CITY.

The charter of Long Island City (chap. 461, Laws of 1871, tit. 3, chap. 1, § 14) gives its common council power to regulate the use of streets by vehicles and railways, and to enforce obedience thereto by penalties, with the reservation that it shall have no power to prohibit or control, in any manner, the use of steam power on any railroad from any part of Long Island to the East river; and it is declared that such railroad companies shall have unobstructed right to run to the East river, "but shall furnish suitable guards or signals at the street crossings." The common council passed an ordinance requiring railroad companies running cars drawn by steam power, within the city lim-

its, to place flagmen at every crossing; and for every violation of the ordinance imposed a penalty of fifty dollars. Defendant's road was constructed and in operation before the enactment of the charter. Its road passed through the city to the East river, crossing one of the city streets. In an action to recover a penalty for not placing a flagman at the crossing, *held*, that plaintiff was not entitled to recover; that it had no control over the defendant's road, and its common council had no power to regulate by ordinance the duty imposed upon defendant to furnish proper guards and signals. *Long Island City v. Long Island R. R. Co.* 561

MANDAMUS.

The canal commissioners having entered into a contract with M. to do certain work, which was of public necessity, and M. having refused to go on with the work because of the refusal of the canal auditor to audit and allow certificates of the commissioners, on the ground that there was no unexpended appropriation to pay them, the relator, at the request of the commissioners, for the purpose of expediting the work, advanced the money required to complete it, in reliance upon a future appropriation by the Legislature, and the certificates were assigned to him. The acts of the commissioners in respect to the work were communicated to the Legislature, from time to time, in the official reports of the commissioners, which stated the amounts expended and the purposes of the expenditure in accordance with the facts. In 1875 a budget was made up in the auditor's office of out-standing certificates, issued for work done on the canal, and furnished to the Legislature when engaged in making an appropriation to pay the same; in which budget the certificates so held by relator were specifically described and included, and an appropriation was made to the precise amount of the budget (§ 1, chap. 263, Laws of 1875.) In proceedings to compel the auditor by

mandamus to draw his warrant for the amount of the certificates; *held*, that the facts authorized a finding, that the act making an appropriation was passed with full knowledge on the part of the Legislature, and with the intent to provide specifically for the payment of said certificates; that the fact that the appropriation was made for this purpose having been established, the questions of ratification or knowledge of the Legislature of the facts relating to the contract, and of the validity of the contract were unimportant; and that the relator was entitled to the relief sought. *People ex rel. Sage v. Schuyler.* 189

— *As to whether party has remedy by mandamus to compel judge, on settlement of interrogatories to be attached to commission, to allow interrogatories, quare.*

See Uline v. N. Y. C. and H. R. R. Co. 175

MANUFACTURING CORPORATIONS.

1. Where a trustee of a manufacturing corporation has become liable for a debt of the corporation, because of failure to make and file an annual statement as required by the statute (§ 12, chap. 40, Laws of 1845), the statute of limitations then begins to run as to that debt, and the right of action is barred in three years thereafter, although the default is continued during successive years; the continuance of the default does not revive the liability or create a new one. *Losce v. Bulard.* 404
2. A technical dissolution of such a corporation is not necessary to relieve a trustee from the consequences of not filing an annual statement thereafter; it is sufficient if the organization has been practically abandoned. *Id.*
3. A judgment was obtained against a manufacturing corporation in 1867; no annual statement was thereafter filed. The company was organized in 1863, with three

trustees; no officers were thereafter elected; it ceased to do business in 1865. In 1870 two of the three trustees sold out their stock to their co-trustee and never afterwards acted, the third trustee was, from the time of the purchase, the sole stockholder. The only act done by him thereafter was the payment of a debt of the corporation incurred in 1865. This action was brought in June, 1875. *Held*, that the corporation was practically abandoned, and the statutory requirement as to filing reports had no application to it; that even if successive defaults could continue or renew the liability, no default was shown to have been committed within three years before the commencement of this action. *Id.*

MARINE COURT OF CITY OF NEW YORK.

1. The provision of the act of 1874, in reference to the Marine Court of the City of New York (§ 9, chap. 545, Laws of 1874), which requires that a notice of appeal, from an order of the General Term of said Marine Court to the Court of Common Pleas, reversing a judgment and granting a new trial, shall "contain an assent, on the part of the appellant, that if the order be affirmed, judgment absolute shall be entered against him," etc., was not repealed or abrogated by the provision of the act of 1875 (chap. 479, Laws of 1875), in reference to said Marine Court, which regulates appeals from the General Terms thereof. *Gordon v. Hartman.* 221

2. Where the Common Pleas affirms the order appealed from, and gives judgment absolute on the stipulation against the appellant, the judgment is final; and no appeal therefrom lies to this court. *Id.*

MARRIED WOMEN.

1. Plaintiff, at the time of the execution of a mortgage by herself and her husband, was the owner in fee

of one-third of the premises; she subsequently received a deed from her husband of the other two-thirds. In an action to redeem, *held*, that defendants were not in a position to raise the question as to plaintiff's rights as grantee of her husband. *Thompson v. Loan Comra.* 55

2. Under the provision of the act of 1860, in reference to married women (§ 3, ch. 90, Laws of 1860), declaring that no conveyance of real estate, by a married woman, "shall be valid without the consent, in writing, of her husband," it was not required that such consent should be a part of or concurrent with the execution of the conveyance, or that it should be given before the delivery thereof; where given thereafter, it validated the conveyance; at least, if given before any attempt, upon the part of the wife, to avoid the conveyance. *Wing v. Schramm.* 619

MASTER AND SERVANT.

A railroad corporation owes a duty, to one employed upon one of its engines, to see that the engine is fit and proper for his use in the performance of the labor he has undertaken; this duty is not discharged simply by employing fit and competent agents to supervise the engine, and see that it is in fit condition; any negligence on the part of such agents, in the performance of their duties in this respect, is the negligence of the corporation. *Kirkpatrick v. N. Y. C. and H. R. R. Co.* 240

MAXIMS.

— "De minimis non curat lex."
See Ross v. Hardin. 84

MECHANICS'S LIEN.

1. By a lease from the owners of certain premises in the county of Queens it was agreed in substance that, "as part of the consideration of the letting," the improvements built or to be built upon the pre-

- mises by the lessee should revert to the lessors at the expiration of the term, and that the lessee would leave them upon the premises; also, that the lessee would insure for half the cost of the buildings built or to be built upon the premises, and in case of fire would devote the proceeds to the re-erection or restoration of the improvements destroyed; in case of default in any of the covenants, on the part of the lessee, the lessor had the right to re-enter. Plaintiff, under a contract with the lessee, erected a building upon the premises. The lessors lived near the premises, saw the building from time to time while plaintiff was engaged in its erection, and made no objection. In an action to foreclose a mechanic's lien, *held*, that the lessee was permitted by the owners to erect the building within the meaning of the mechanic's lien law for said county (§ 1, chap. 478, Laws of 1862); and that the said lien was valid and enforceable against the land. *Burkitt v. Harper*. 273.
2. The notice of lien filed did not allege that the owners permitted the lessee to build, but that they permitted the plaintiff to furnish the work and material; it specified the amount of the claim, the person against whom it was made, and the name of the owner and the situation of the building, particularly describing the land; it also stated that the work and material were furnished pursuant to a contract with the lessee. *Held*, that the notice was sufficient; that it was not necessary to state therein the permission of the owner, this was simply a fact to be alleged in the complaint. *Id.*
 3. Where, in a proceeding under the general lien law (chap. 402, Laws of 1854, as amended by chap. 558, Laws of 1869, and chap. 489, Laws of 1873), to foreclose an alleged mechanic's lien, it appears that no lien ever existed, a personal judgment cannot be rendered against the owner of the premises upon an independent contract between him and the claimant. *Weyer v. Beach*. 409.
 4. The proceeding being statutory can only be resorted to in a case falling within the statute, i. e., where a mechanic's lien exists. The power to render a personal judgment is merely incidental to the main purpose, and where it appears that no lien ever existed the whole proceeding falls. *Id.*
 5. As to whether, under said act, any personal judgment can be rendered except for a deficiency, *quære*. *Id.*

MONEY.

1. The possession of money vests the title in the holder, as to third persons dealing with him and receiving it in due course of business and in good faith, upon a consideration good as between the parties. *Stephens v. Bd. Edn.* 183.
2. The doctrine, that an antecedent debt is not such a consideration as will cut off the equities of third parties, in respect to negotiable securities obtained by fraud, has no application to money so obtained. *Id.*

MONEY HAD AND RECEIVED.

1. One G., who was a member of the board, defendant herein, as attorney for it received \$3,600.84 of its money, which he wrongfully appropriated to his own use; he subsequently procured from plaintiff on a forged mortgage \$4,129.34, which he deposited in a bank to his credit, and on the same day drew his check on said bank to defendant's order for the amount so appropriated, and delivered the same to the defendant, who received it, without notice or knowledge of the fraud perpetrated upon plaintiff, and gave G. credit therefor; the check was paid and the money received thereon used by defendant. In an action to recover the amount so received by defendant from G., *held*, that defendant having received the money in good faith, and in the ordinary course of business, for a valuable consideration, was not liable. *Stephens v. Bd. Edn.* 183.

2. *It seems*, that while the money remained on deposit in the bank, plaintiff could have compelled the bank to restore it, but having paid it out without notice of any defect in the title of G., it was thereafter protected. *Id.*

MORTGAGE.

1. Defendant T. was one of the trustees of a savings bank, to make up a deficiency in the assets of the bank, caused by a loss upon a loan made by it, he executed a mortgage to H., who assigned it to the bank. In an action to foreclose the mortgage, *held*, that T. in executing it did not thereby become a surety or obligor for moneys loaned by the bank, within the meaning of the provision of the act of 1875, in relation to savings banks (§ 21, chap. 371, Laws of 1875), which prohibits a trustee from becoming such surety or obligor; and so, that the mortgage was not invalid as violative of that provision. *Best v. Thiel.* 15
2. The claim was made that the trustees of the bank were personally liable for the deficiency. The superintendent of the banking department informed them that they were so liable, and that this liability would be enforced unless they made up the deficiency, and upon his requirement the mortgage was executed. T. set up want of consideration as a defense. *Held*, untenable. 1st. The seal was presumptive evidence of a consideration, which presumption was not clearly overcome. 2nd. T. was estopped from denying the legal validity of the mortgage, as it was with his knowledge and assent reported to the bank department and represented to the depositors of the bank as a portion of its assets, and upon the strength thereof and other similar securities, the bank was permitted to continue its business. *Id.*
3. To enable a subsequent purchaser to assail a prior unrecorded mortgage under the recording act (1 R. S., 756, § 1), it is incumbent upon him to show not only that he

was a *bona fide* purchaser for value without notice, but that his conveyance was first recorded. *Westbrook v. Gleason.* 23

4. Where a junior mortgagee, with notice of a prior unrecorded mortgage, assigns his mortgage to a *bona fide* purchaser for value, who has no notice, the assignment is the "conveyance," within the meaning of said act (1 R. S., 762, §§ 37, 38), and such assignee is entitled to preference, only in case he records his assignment before the first mortgage is recorded. (DANFORTH, J., dissenting.) *Id.*
5. *It seems*, that where, at the time of the execution of a mortgage, A., a third party, is in possession of the mortgaged premises, under an executory contract for the purchase thereof, and has made improvements thereon, and subsequently, and before the mortgage is recorded, A. takes a conveyance, in good faith, without knowledge of the mortgage, giving his bond and mortgage for the whole of the purchase-price, and the deed and subsequent mortgage are recorded before the prior mortgage, the title of A. is superior to the prior mortgage; and a purchaser upon foreclosure of the mortgage so given by A. takes all his title, and so takes the premises freed from the lien of the prior mortgage. *Id.*
6. In such case, for the purpose of determining the question of the lien of the prior mortgage, the legal title of A. will be considered as relating back to his equitable title, and is thus freed from the lien; but if by accepting a deed A. loses his equitable rights as vendee in possession under his contract, then he is protected by the recording act, as by parting with such rights he becomes a purchaser for value, and is entitled on that ground to priority, although he paid no portion of the purchase-money. *Id.*
7. A sale under a mortgage, given pursuant to the act, "authorizing a loan of certain moneys belonging to the United States" (chap. 150,

- Laws of 1837), being a statutory proceeding, a failure to comply with the provisions of the statute, renders the sale void. *Thompson v. Loan Comrs.* 54
8. The advertisement of sale must indicate who executed the mortgage, and to whom it was given. *Id.*
9. Commissioners appointed under said act, in case of default in payment as specified therein, become seized as trustees only, subject to the possession and the right of the mortgagor to redeem, until a legal sale is made in conformity with the statute. *Id.*
10. Where a published notice of sale under such a mortgage omitted the name of one of the mortgagors, and stated that the mortgage was given to "the Commissioners of the United States Deposit Fund," instead of "the Commissioners for loaning certain moneys of the United States," as stated in the mortgage, and as designated by the statute. *Held*, that the notice was defective and the sale illegal; and that the mortgagors were thereafter entitled to redeem. *Id.*
11. After such an illegal sale a mortgagor served upon the commissioners a notice in writing, offering to pay the amount of the mortgage, principal and interest, and to redeem the premises; also stating therein that she desired an accounting of the rents and profits, possession having been taken by the purchaser. The commissioners made no answer. In an action to redeem, *held*, that the omission to make tender was not fatal to the action, but that in any event it only affected the question of costs; that the plaintiff in such an action occupied the same position as any other mortgagor seeking to redeem; also, that plaintiff was entitled to an accounting from the purchaser and his successors in interest and possession for the rents and profits. *Id.*
12. Also, *held*, that such an action, with all the parties brought in, was the proper remedy in such case. *Id.*
13. Plaintiff, at the time of the execution of the mortgage, was the owner in fee of one-third of the premises; she subsequently received a deed from her husband of the other two-thirds. *Held*, that defendants were not in a position to raise the question as to plaintiff's rights as grantee of her husband. *Id.*
14. In an action to foreclose a mortgage for \$2,500, the defense was usury. The court found that the mortgage and accompanying bond were executed to one H., not as a security, but only for the purpose of being sold to plaintiff at a discount; that they were so sold and were usurious. Defendants' evidence was to the effect that F., the mortgagor, before the execution of the bond and mortgage, applied to plaintiff for a loan of \$2,500, that plaintiff directed him to go and make a mortgage to somebody else, that he could buy it of them, and would loan the money. No terms of loan were stated, and no property specified to be mortgaged. H. held judgments against F. to the amount of about \$900. The bond and mortgage were executed to secure this indebtedness. H. also advanced thereon \$300, and it was understood that the balance realized on sale of the securities after paying the judgments and the money advanced was to be paid to F. They were offered to other parties before plaintiff purchased, and were sold to him at a discount. *Held*, that the evidence did not sustain the finding; that the defense of usury was not made out, but only, as to part of the sum secured, a failure or want of consideration, that the bond and mortgage were valid securities in the hands of H. for the amount of his judgments and the sum advanced by him, and to that extent, at least, plaintiff, standing in the place of H., could enforce them. *Sickles v. Flanagan.* 224
15. As to whether plaintiff would be entitled to recover any more than the amount due H., *quære.* *Id.*

16. One who purchases a part of mortgaged lands, and agrees with his grantor to assume and pay the whole mortgage, may discharge his land from the consequences of that assumption, by agreement made with his grantor while the latter is still the owner of the residue, and a grantee of the residue, after such discharge, cannot claim the benefit of the assumption. The grantee succeeds only to the equities of his grantor, existing at the time of the conveyance, and that without regard to any question of notice. *Judson v. Dada.* 873

17. As to whether the personal liability incurred by the first grantee to the holder of the mortgage by assuming its payment, could be discharged by subsequent agreement between them and their grantor, *quære.* *Id.*

18. Defendant E. executed his bond and mortgage to secure the People's Safe Deposit and Savings Institution, for any indebtedness it had against the mortgagor, "upon or by reason of any promissory note, bill of exchange, overdraft, or otherwise." Subsequently said corporation loaned to the mortgagor various sums of money upon the discount of his notes, which expressed that the maker had deposited the bond and mortgage as collateral. In an action to foreclose the mortgage, *held*, that the notes were void, as the corporation had no power, under its charter, to loan money on personal security (chap. 816, Laws of 1868), and was prohibited by statute from discounting commercial paper (1 R. S., 712, §§ 3, 6); but that the corporation was authorized by its charter (§ 11) to invest in bonds and mortgages; that there was a loan which was within the condition of the mortgage; that the fact that the loan was made by way of discount, and upon the security of the notes, as well as of the mortgage, did not vitiate the latter; and that it was a valid security for the loan and enforceable as such. *Pratt v. Eaton.* 449

See FORECLOSURE.

SICKELS—VOL. XXXIV.

MOTIONS AND ORDERS.

1. The decision of a judge in settling interrogatories to be attached to a commission is an order (Code, § 767); if it disallows a pertinent question, it affects a substantial right; and is therefore appealable. (Code, §§ 1347, 1343.) *Uline v. N. Y. C. and H. R. R. Co.* 175

2. An appeal does not lie from an order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial. (Code, § 911.) *Id.*

3. Under the Code of Civil Procedure (§ 1338), where an order of General Term, reversing a judgment entered upon the report of a referee, does not state that it was made on questions of fact it will be deemed to have been made on questions of law only. *Weyer v. Beach.* 409

4. An order punishing for contempt, in violating an injunction, can only be reviewed, upon the merits or for alleged legal error, on appeal from the order. *Watrous v. Kearney.* 496

5. It is within the discretion of the court whether to open or vacate the order on motion, and the exercise of this discretion cannot be reviewed here. *Id.*

6. An order punishing defendants for contempt was granted by default. On motion to vacate the order, it was alleged, in the moving papers, that the attorneys who appeared for the defendants in the proceedings had no authority. The attorney, who appeared on return of the attachment, made affidavit that he was authorized; the defendants were also personally present; the same attorney appeared before the referee, to whom it was referred, to take proofs. Notice of motion for final order was served on, and service admitted by, attorneys who had appeared for defendants in the action, and who had also admitted service of the referee's report. *Held*, that as the attorneys thus undertook to repre-

sent defendants, the mere allegation of want of authority so to do did not invalidate the order. *Id.*

7. The provision of the Code of Civil Procedure (§ 1342), in reference to appeals to the Supreme Court from orders of a County Court, confines the appellate jurisdiction to orders in actions originating in the County Court. *Andrews v. Long.* 573

8. Accordingly, *held*, that an order of County Court dismissing an appeal from a judgment of a justice of the peace, was not appealable to the Supreme Court. *Id.*

9. A supplemental complaint should not be allowed upon an *ex parte* application. *Fleischmann v. Bennett.* 579

10. Notwithstanding the mandatory language of the Code of Civil Procedure (§ 544), it is the duty of the court, upon the application, to consider all the circumstances, and to grant or refuse it, as may be just and proper in the particular case; such application therefore should be upon notice, so that both parties may be heard. *Id.*

11. Where an order of Special Term, vacating an assessment for a local improvement, is reversed by the General Term on the ground that the assessment should be reduced not vacated, and the case is remitted to the Special Term, that the assessment may be modified in conformity with the principles laid down by the General Term, the order of General Term is not a final order; and so is not reviewable here. *In re Pet. Auchmuty.* 622

— *When question whether machinery is a fixture or personal property will not be determined on motion.*

See Mut. L. Ins. Co. v. Bigler. 568

MUNICIPAL CORPORATIONS.

1. A municipal corporation has no greater right than an individual to collect the surface-water from its lands and streets into an artificial channel, and to discharge

them upon the lands of another. *Noonan v. City of Albany.* 470

2. Defendant, by means of sewers and the manner of grading of one of its streets, concentrated the surface-water and sewage of a large territory and discharged it in one body into a ravine. A small rivulet formerly ran down through this ravine. Defendant, with the consent of the proprietors, had changed this water-course by constructing a box-drain two or three feet square in its place. The water discharged, as aforesaid, into the ravine, passed over the ground, used as a dumping place for refuse, and then down the ravine into the box-drain, and having no sufficient outlet flooded plaintiff's premises below and deposited thereon the filth carried by the sewers, and the sand and dirt washed down from the dumping ground. It did not appear that defendant owned any of the lands between the sewer and the water-course. In an action to recover the damages, *held*, that the facts established *prima facie* a cause of action; and that they justified a submission of the case to the jury. *Id.*

3. It appeared that the box-drain was obstructed below plaintiff's premises, so that the water and sewage were prevented from passing therein, as it otherwise would; it did not appear that this was attributable to any act of plaintiff's, or for which he was responsible; he had no control over the drain below his premises. *Held*, that this did not constitute a defense; that plaintiff was not bound to protect himself from the illegal act of the defendant by removing or causing the removal of the obstruction. *Id.*

4. A fact admitted by a municipal corporation through its officer duly and properly acting within the scope of his authority, is evidence against it, and cannot be withdrawn to the prejudice of one who in reliance upon it has changed his position in respect to the matter affected thereby. *Curnen v. Mayor, etc.* 511

5. The doctrine of estoppel applies in such case to a corporation as well as to an individual. *Id.*

See BROOKLYN (CITY OF).
BUFFALO (CITY OF).
LONG ISLAND (CITY OF).
NEW YORK (CITY OF).

MURDER.

— *Prisoner may withdraw challenge of array of jurors on trial of an indictment for, and this waives irregularity; also as to competency of evidence on such trial.*

See *Pierson v. People.* 424

NATIONAL BANKS.

See BANKS AND BANKING

NEGLIGENCE.

1. It is not, as matter of law, negligence for a person approaching a railroad in a carriage, upon a highway, not to stop; his omission to do so is a fact to be submitted to the jury. *Kellogg v. N. Y. C. and H. R. R. Co.* 72

2. In an action to recover damages for alleged negligence, causing the death of C., plaintiff's testator, who was killed at a railroad crossing, it appeared that the railroad track runs north and south, the highway east and west; at the crossing and on both sides thereof there was a cutting for the railroad track; and one also for the highway east of the track, seven or eight feet deep, for a considerable distance, with a board fence, and other obstructions to view on the top of the embankment to the south. C. approached the crossing from the east, in a one-horse wagon. He was driving at a very slow trot with one hand, holding a pail in the other; the train, by which he was killed, came from the south at a high rate of speed, and as plaintiff's evidence tended to show, without ringing a bell. C. was familiar with the crossing, and with the running of trains; he approached the crossing about

the time trains were due both ways; the wind at the time was blowing from the north; C. was seen a moment before he was struck by the engine looking towards the north. *Held*, that the questions of negligence on the part of defendant and contributory negligence on the part of C. were of fact for the jury. *Id.*

3. In such an action evidence, on the part of the defendant, that the life of the deceased was insured is incompetent. *Id.*

4. In an action to recover damages for alleged negligence causing the death of K., plaintiff's intestate, it appeared that the death was caused by the explosion of a boiler of a locomotive upon which K. was employed as a fireman. Plaintiff's evidence tended to show that the engine was infirm and weak, was frequently, and from necessity, taken to the repair shops for repairs; that it was unable to hold water, or sustain a full head of steam. *Held*, that the defendant's negligence was one of fact for the jury. *Kirkpatrick v. N. Y. C. and H. R. R. Co.* 240

5. Upon the cross-examination of S., a witness for plaintiff, who had given material testimony for him, and who had been in defendant's employ, he was asked if he was discharged for inefficiency and drunkenness; if he was discharged at all; and if O., his "immediate boss," did not assign these reasons for discharging him, to all of which he answered, "No." O. was called by defendant's counsel, who offered to prove by him, that he became aware that S. was in the habit of being intoxicated, and neglected, his duty, and that he was discharged for that reason. This was excluded. *Held*, no error; that the fact of his discharge was immaterial; that if the discharge was for inefficiency or drunkenness, this could not be proved by way of impeachment, and was matter collateral to the issue, as to which the answers of S. were conclusive; that if such grounds for the discharge were communicated to S., it might lay the foundation

of an inquiry as to his feelings toward defendant; but as defendant did not offer to show this, and as it was not disclosed on the trial that the offer was to show a hostile feeling, the question could not be presented here. *Id.*

6. In an action for negligence, to justify a nonsuit on the ground of contributory negligence, the undisputed facts must show the omission or commission of some act which the law adjudges negligence; the negligence must appear so clearly that no construction of the evidence or inference drawn from the facts will warrant a contrary conclusion. *Stackus v. N. Y. C. and H. R. R. Co.* 464

7. In an action to recover damages for injuries sustained by plaintiff in consequence of a collision at a highway crossing, plaintiff's evidence was to the effect that he was traveling westerly in a covered buggy with two spirited horses, upon a highway which crosses defendant's track at an acute angle, and for several rods east of the crossing runs near to and nearly parallel with the track. He was acquainted with the crossing, and the running of the trains; a train from the east was past due; plaintiff supposed it had passed, as while approaching the crossing he had heard a train going east, and if on time it would have passed. A train was about due from the west. When he came near to the signboard warning travelers to look out for the cars, he stopped his team and looked east and west for trains; he could see about fifty rods east; seeing no train, he started on to cross the track, looking and listening both ways as much as he could without getting out, or off from his seat, but he neither heard nor saw anything. The train from the east struck plaintiff's buggy, and he was injured. Plaintiff was nonsuited on the ground of contributory negligence. *Held*, error; that the failure of the plaintiff to let down his buggy top when he started up, was not, as matter of law, negligence. *Id.*

NEW TRIAL.

1. An application for a new trial, under the statute, in an action of ejectment, was made on behalf of defendant and one L., who claimed to have derived his interest from B. who, it was alleged, was the landlord under whom defendant was in possession. The right of L. was expressly controverted by the opposing affidavits, and it was also shown that, when the action was ready for trial, defendant withdrew his answer, and judgment was entered by his consent in open court. The application was made by an attorney who was not the attorney of record of defendant, and who had not been substituted in place of the original attorney. The application was denied with leave to renew. *Held*, that as it was at least very uncertain what were the facts, and whether a case was made out within the statute (2 R. S., 309, §§ 36, 37, as amended by chap. 485, Laws of 1862), and as the moving parties had not availed themselves of the permission given to supply the defects, the order should be affirmed. *Sacia v. O'Connor.* 260

2. This court can only review judgments and grant new trials for errors of law, and such errors must be pointed out by exceptions taken at a proper time. *Standard Oil Co. v. Amazon Ins. Co.* 506

3. Where, therefore, it is alleged that a verdict is perverse, excessive in amount, and contrary to the law and the evidence, the judgment entered thereon cannot be reviewed here without an exception. *Id.*

4. This rule has not been changed by the provision of the Code of Civil Procedure (§ 999) in reference to the granting of a new trial by the judge presiding at the trial. *Id.*

5. For such errors, it seems, the General Term has power to grant a new trial in its discretion, although no exceptions were taken on the trial. *Id.*

NEW YORK (CITY OF).

1. *It seems*, that the commissioner of public works in the city of New York, being charged with the care of the public buildings (§ 71, chap. 335, Laws of 1873), has the power to appoint janitors to take charge of the buildings in which the police and district courts are located. *Kennedy v. Mayor, etc.* 361
2. Plaintiff was appointed by said commissioner janitor of the building occupied by the police court of the second district, and by the district or civil court of the third district; the justice of the latter court appointed C. janitor for that court. The board of estimate and apportionment made an appropriation for the salary of one janitor for said building, conditioned however, substantially, that no portion thereof should be paid by the comptroller to either appointee until the question was judicially determined that he was and that the other was not entitled to be paid. *Held*, that the appropriation could only be availed of in an action or submission, to which both claimants were parties, and then only on establishing that the power to appoint janitors was exclusive, either in the court or the commissioner, and that there could be but one janitor; and that, therefore, plaintiff was not entitled to judgment upon a submission of the controversy under the Code of Civil Procedure (§ 1279) as between him and the city, to which C. was not a party. *Id.*
3. The only power conferred upon the board of health by the provisions of the act of 1871, "to provide for the proper drainage of lands," in the city of New York (chap. 566, Laws of 1871), is to direct the drainage of land by means other than sewers, where surface water, injurious to public health, could not be carried off by the sewers; and to assess the expense upon lands benefited by the drain, the area of assessment being restricted to the lands between the drain and the adjacent streets and avenues. *In re Pet. Van Buren.* 384
4. The commissioner of public works, in pursuance of a requisition of the board of health, directing him to cause the lands within certain bounds, which included many blocks and about seventy acres of sunken land, to be drained by other means than sewers, caused drains to be dug and the lands to be filled in, the whole cost of the improvement being about \$308,000, of which only \$5,491.20 was for drains; \$248,534.27 of the cost was assessed in one assessment upon the property owners, blocks of land being assessed through which the drains did not run. *Held*, that said act did not authorize such improvement; also that, even if the filling in could be claimed as merely an incident to the construction of the drains, the assessment was illegal, as there was no authority for mingling in the assessment the cost of drains running between different streets. *Id.*
5. In an action to compel the defendant to discharge a lot in the city of New York belonging to plaintiff from the lien of certain assessments, and to discharge the same of record, it appeared that before plaintiff paid the purchase price for the lot, she ascertained, at the proper office, from the official records, that two assessments, laid in July and August, 1872, upon the lots, were marked upon the record of assessments as "paid by Killian Brothers, * * * March 7, 1873." Plaintiff thereupon, after deducting certain assessments which appeared in the records unpaid, paid the balance of the purchase money and received a deed in November, 1873. These assessments were, in fact, paid at the time stated, by Killian Brothers, they supposing the lot was their's, when, in fact, it was not, and the entry was then made by the official having charge of the record. In August, 1876, Killian Brothers commenced an action against defendant to recover back the moneys so paid, alleging they were paid through mistake. Plaintiff was not made a party, and had no notice or knowledge of the action. Defendant served

- an offer allowing judgment to be entered therein for the amount claimed; judgment was so entered to that effect, and also directing that the entries of payment be cancelled, which was done. *Held*, that plaintiff was entitled to the relief sought; that the fact that the payment was entered as made by Killian Brothers was not sufficient to put plaintiff upon inquiry or charge her with constructive notice of the error, nor was the fact that in making and receiving the payment the parties acted under a mistake material so far as plaintiff was concerned. *Curnen v. Mayor, etc.* 511
6. Also, *held*, that the provision of the act of 1853 in relation to the collection of arrears of taxes, etc., in the city of New York (§ 16, chap. 579, Laws of 1853), providing for the obtaining of receipts or certificates from the clerk of arrears showing payment of assessments, had no application, as it relates only to assessments which have been due twelve months and over, while the assessments in question were paid within nine months after they were due, and while they were still in the collector's office. *Id.*
7. *It seems*, that such receipts or certificates are not the only evidence of the removal of the liens of assessments, even as to those specified. *Id.*
8. The power to remove certain city officers "for cause," and after opportunity to be heard, given to the mayor by the charter of the city of New York of 1873 (§ 25, chap. 335, Laws of 1873), can only be exercised upon just and reasonable grounds, and after notice to the person charged. The proceeding must be instituted upon specific charges, sufficient in their nature to warrant the removal, which, unless admitted, must be proved; the defendant may cross-examine the witnesses to support the charges, call others in his defense, and in all the steps of the proceedings is entitled to be represented by counsel. *People ex rel. Mayor v. Nichols.* 582
9. The proceeding, therefore, being judicial in its character is subject to review by a writ of certiorari issued by the Supreme Court. *Id.*
10. A motion for judgment upon the return to a writ of certiorari in such proceedings presents a question of law only, and comes within the class of non-enumerated motions as defined by Supreme Court rule thirty-eight. *Id.*
11. But if otherwise it is within the jurisdiction of the court to hear it at any Special Term, and upon such notice as shall be prescribed. *Id.*
12. A notice of less than eight days may be prescribed (Code of Civil Procedure, § 780, S. C. rule 87), by order to show cause. *Id.*
13. The power to shorten notice is not affected by the rule of the Supreme Court (rule 44), providing that a case on certiorari may be brought to a hearing upon the usual notice of argument; the rule is binding only so far as it is consistent with the Code (§ 17). *Id.*
14. *It seems*, that the exercise of this power is subject to review whenever an order to show cause at Special Term is granted. *Id.*
15. It is not improper to bring on the certiorari for a hearing at the Special Term at which the order to show cause is made returnable. *Id.*
16. The mayor of the city of New York having removed the defendant N. from the office of commissioner of police, a writ of certiorari was, upon his application, duly allowed and made returnable at a Special Term designated "for non-enumerated motions and chamber business," on the first Monday of September, 1879. A return to the writ was filed September fifteenth; on the sixteenth, the justice assigned to hold that term made an order requiring the mayor to show cause at the Special Term, to be held on September twenty-second, why N. should not have judgment

on the return, vacating the judgment of the mayor; the order provided that service on September seventeenth, would be sufficient. Whereupon the General Term granted an order directing that a writ of prohibition issue prohibiting the Special Term appointed to be held in the city of New York for non-enumerated motions and chamber business, and the justices appointed to preside thereat, from proceeding to entertain any motion or application for any judgment or order affecting the proceedings of the Mayor. On appeal from the order, *held*, that there was no violation of the provisions of any statute or unlawful exercise of jurisdiction by the justice holding the Special Term; and that the order appealed from was erroneous. *Id.*

See MARINE COURT OF CITY OF NEW YORK.

NEXT OF KIN.

1. M. died intestate, leaving no descendant, parent, brother, sister, descendant of any brother or sister, uncle, or aunt, but leaving first cousins, and the children of deceased first cousins. *Held*, that the first cousins were entitled to the personal estate, to the exclusion of said children. *Ades v. Campbell.* 52
2. The statute of distributions (2 R. S., 95, § 75, subds. 5, 11), provides for no representation among collaterals, except in the case of children of brothers and sisters of the intestate; if there are none of these the nearest of kin, in equal degree, take the whole. *Id.*

NOTICE.

1. A purchaser, for a valuable consideration, is not chargeable with constructive notice that the conveyance to him was made by his vendor with intent to defraud creditors; actual notice is required to impair or affect his title. (2 R. S., 137, § 5.) *Stearns v. Gage.* 102

2. A supplemental complaint should not be allowed upon an *ex parte* application. *Fleischmann v. Bennett.* 579

3. Notwithstanding the mandatory language of the Code of Civil Procedure (§ 544), it is the duty of the court, upon the application, to consider all the circumstances, and to grant or refuse it, as may be just and proper in the particular case; such application therefore should be upon notice, so that both parties may be heard. *Id.*

— Of application for writ of certiorari to remove indictments from Oyer and Terminer into Supreme Court not necessary.

See *Jones v. People.* 45

— To creditors published by executors, sufficiency of.

See *Cornes v. Wilkin.* 129

— Of mechanics' lien, sufficiency of.

See *Burkitt v. Harper.* 273

OFFICE AND OFFICER.

1. Where a work of public necessity is done under an invalid contract, or even voluntarily, without the authority of any public officer, and the Legislature appropriates money to pay for it, a disbursing officer cannot refuse to apply the money to the purpose for which it was appropriated, on the ground that the State was not originally under any legal obligations to make payment, or that the Legislature was not sufficiently informed of the facts; the only question for such officer is whether the appropriation was for the purpose claimed; when this is ascertained his duty is ministerial only. *People ex rel. Sage v. Schuyler.* 189
2. The power to remove certain city officers "for cause," and after opportunity to be heard, given to the mayor by the charter of the city of New York of 1873 (§ 25, chap. 335, Laws of 1873), can only be exercised upon just and reasonable grounds, and after notice to the person charged. The proceeding

must be instituted upon specific charges, sufficient in their nature to warrant the removal, which, unless admitted, must be proved; the defendant may cross-examine the witnesses to support the charges, to call others in his defense, and in all the steps of the proceedings is entitled to be represented by counsel. *People ex rel. Mayor, etc., v. Nichols.* 582

See ELECTION OF OFFICERS.

PARTIES.

1. Where one railroad company has leased the road of another, such lessee is a necessary party to a proceeding under the general railroad act, by a third company, to acquire the right to cross the leased road; it may voluntarily agree with the petitioner in respect to the crossing, and such agreement, while not binding upon the lessor, in respect to its interests as reversioner, binds the interests of the lessee. *In re B. H. T. and W. R. R. Co.* 69
2. In such case it is not essential that one proceeding shall embrace all the parties; it will only affect the parties brought in, and where the lessee is alone made a party, the estate in reversion will not be affected. *Id.*
3. Plaintiff was appointed by said commissioner janitor of the building occupied by the police court of the second district, and by the district or civil court of the third district; the justice of the latter court appointed C. janitor for that court. The board of estimate and apportionment made an appropriation for the salary of one janitor for said building, conditioned however, substantially, that no portion thereof should be paid by the comptroller to either appointee until the question was judicially determined that he was and that the other was not entitled to be paid. *Held*, that the appropriation could only be availed of in an action or submission, to which both claimants were parties, and then only on establishing that the

power to appoint janitors was exclusive, either in the court or the commissioner, and that there could be but one janitor; and that, therefore, plaintiff was not entitled to judgment upon a submission of the controversy under the Code of Civil Procedure (§ 1279) as between him and the city, to which C. was not a party. *Kennedy v. Mayor, etc.* 361

4. Where a party was called as a witness by the adverse party and was examined as to a transaction with a deceased party in reference to which he would have been precluded from testifying in his own behalf under the Code of Procedure (§ 399), *held*, that the witness was entitled upon cross-examination, to explain his testimony, and to state the whole transaction. *Merritt v. Campbell.* 625

— When tax-payer may bring action to restrain the negotiation or payment of town bonds and to compel cancellation.

See *Metzger v. A. and A. R. R. Co.* 177

— When party incompetent as a witness under section 829 of Code. See *Church v. Howard.* 415

— Where pleadings admit title in parties, this precludes objection that third person has interest and should have been made party; also when executor having power to sell is not necessary party to action for partition.

See *Prentice v. Janssen.* 479

— When beneficiaries are properly brought in as parties to action to construe a will.

See *Power v. Cassidy.* 602

PARTITION.

1. The court has power, in an action for partition, where the parties are tenants in common of real or personal estate, to direct a sale of the whole in one parcel, where the interests of the parties will be promoted by such sale. *Prentice v. Janssen.* 478

2. The will of B. authorized his son F. to carry on the hotel business for five years, if he so desired, in a certain hotel owned by the testator; and empowered his executors to sell the hotel property, after the occupancy of his son had ceased, and divide the proceeds among his residuary legatees. F. died before the testator; no action was ever taken by the executors to sell the property. Three of the four legatees, or their successors in interest, conveyed their interests to plaintiff. Defendant M., the other legatee, joined with the plaintiff in making leases of the property; and large sums were expended by them in making improvements. In an action for partition, the only surviving executor was made a party defendant, as the husband of M.; he did not, by his answer, claim any rights as executor, or that he was a proper party as such. *Held*, that the executors took no interest in the lands, but merely a power in trust, to be executed simply for the purposes of distribution, liable to be defeated by a re-conversion into realty of the property which was converted by the will into personalty; that the parties beneficially interested had a right to elect to make such a re-conversion, and their acts showed such an election; that the power of sale thereby become extinguished, and the parties became owners as tenants in common, and so that a partition was proper; also that the surviving executor had no title, interest, or lien upon the property which rendered him a necessary party to the action as such executor; that the provision of the Revised Statutes (1 R. S., 735, § 107), which makes a power of sale a lien or charge upon land, had no application, as the power had ceased to exist; also that equity would not interpose to compel the execution of the power (1 R. S., 734, § 95), as the purpose had been accomplished without its exercise. *Id.*

3. The will gave various legacies; this action was commenced seven years after the testator's death; it did not appear that any debts or

legacies remained unpaid. *Held*, that these facts did not make the executor, as such, a necessary party; that, as the debts and legacies are primarily to be paid out of the personalty, the presumption was that they had been paid, particularly as no such defense, as that they were unpaid, was set up in the answer or interposed on trial; also that the same presumption also existed as to testamentary expenses. *Id.*

4. By the lease of the hotel property, executed by plaintiff and defendant M. as lessors, they were required to make all necessary repairs; plaintiff made the repairs and also erected a new building, M. acquiescing therein. *Held*, that the share of M. was properly chargeable with its proportion of the expenditures; so also of the costs. *Id.*

5. The hotel property consisted of four lots, not contiguous, but all used in carrying on the hotel business. The referee found that the real estate and the personal property, *i. e.*, the furniture, etc., in the hotel could not be sold in separate parcels without greatly depreciating its value, injuring the owners and violating the rights of the lessee; the judgment directed the whole to be sold in one parcel. *Held*, no error. *Id.*

6. There were five residuary legatees named in the will; one of them was F., who died intestate, leaving no descendants. The pleadings admitted that the parties to the action were the sole owners of the real estate. *Held*, that this precluded an objection that an heir of F. had an outstanding interest and should have been made a party. *Id.*

PARTNERSHIP.

1. E. plaintiff's testator, defendant and one S. entered into a co-partnership in 1855, "for so long a time as they shall mutually agree," E. to receive one-tenth, defendant four-tenths and S. five-tenths of the net profits. For the year 1872,

- E. received a greater proportion, defendant a less, S. the same. On January 1, 1873, defendant executed an instrument by which he agreed to pay E. "four and three-eighths per cent of the net ascertained profits" of the firm "during the year 1873." E. remained in the firm, receiving during the year the share of profits stated in the original agreement. In an action upon the instrument, *held*, that the facts authorized an inference that E. consented to continue the co-partnership, in consequence of the promise of defendant; and that this was a sufficient consideration for the promise. *Emery v. Wilson.* 78
2. Upon the death of S. defendant brought an action for an accounting and settlement of the partnership affairs. E. set up in his answer therein that he was entitled, for the year 1873, by agreement, to a greater percentage of profits than that specified in the co-partnership agreement. On the trial he offered in evidence the instrument above described, which was rejected. *Held*, that the former action was no bar to this; that the undertaking of defendant was an individual one having no relation to the partnership or its affairs, as such. *Id.*
 3. By the articles of co-partnership it was provided that quarterly accounts should be taken and settled between "the co-partners, to the intent that it may thereby appear what are the net profits." *Held*, that it was proper to take the quarterly statements so taken, and entered upon the books for the year 1873, as the "net ascertained profits" upon which the percentage was to be paid by defendant; and that it was no error for the referee to refuse to deduct from the profits so ascertained the depreciation in value of the firm property. *Id.*
 4. In an action for an accounting between a surviving partner and the representatives of a deceased partner, the former is entitled to credit for all sums paid by him to the latter, after their appointment, out of funds collected by him as surviving partner. *Collender v. Phelan.* 366
 5. In the case upon appeal, in such an action, it appeared that plaintiff, the surviving partner, testified without objection to payments so made; in a subsequent part of the case it was stated that it was understood plaintiff should produce vouchers; it did not appear what vouchers were wanting, or that there was any application to strike out the testimony in default of such production, nor was there any objection, ruling or exception on the subject of the necessity of the vouchers. *Held*, that this question not having been raised on the trial could not be raised on appeal. *Id.*
 6. Plaintiff, in making payments of the indebtedness of the firm, advanced moneys from time to time from his own funds, in excess of the amount in his hands as surviving partner. *Held*, that he was entitled to interest on such advances. *Id.*
 7. The findings of the referee did not show upon what particular payments interest was allowed. *Held*, that it could not be claimed that too much interest was allowed, as there was no specific finding disclosing any such error. *Id.*
 8. To reverse the conclusions of law of a referee it must appear from the facts found that they are erroneous. *Id.*
 9. At the time of the death of P., the deceased partner, the firm had contracts for the manufacture and sale of articles under patents belonging to the firm or the partners jointly, which contracts were for a period extending beyond the time of such death. It appeared that large profits would have been realized by the firm, had it continued and the other parties had remained solvent, in carrying out said contract; it did not appear, however, that they had any value aside from the value of the use of the patents. Defendants sold and

- assigned to plaintiff the interest of their testator at the time of his death in the stock, fixtures, etc., of the firm, and also in said letters patent, and in the lease of the warehouse occupied by the firm, plaintiff agreeing to assume and pay all salaries due employees, etc., accruing subsequent to the death of P. In none of the writings was any reference made to the outstanding contracts, *held*, that the transfers, etc., afforded a strong inference that the intent of the parties was that plaintiff should continue the former business on his own sole account, and that no benefit was intended to be reserved to defendants from manufactures under said contracts; and that a finding that defendants were not entitled to any credit or allowance on account of the contracts was justified. *Id.*
10. Plaintiff and defendant were formerly partners in business, as dentists, under the firm name of "Morgan & Schuyler." Upon the dissolution of the firm defendant bought plaintiff's interest in certain firm property, and became equitable assignee of the unexpired term of the lease of the room occupied by the firm, in which he continued the business, using signs bearing his name, followed by the words "successor to Morgan & Schuyler." There was nothing in the agreement of dissolution prohibiting plaintiff from engaging in the business, and it was understood at the time between the parties that he was to open an office for that purpose in another part of the city, which he did. In an action to restrain defendant from using plaintiff's name, *held*, that defendant did not acquire, by the agreement of dissolution, any good will in the business, except such as was incident to his sole ownership of partnership property, and his exclusive right to occupy the rooms of the late firm; that he was not authorized to use the firm name, or to declare himself "successor to" the late firm; and that, therefore, the action was maintainable. *Morgan v. Schuyler.* 490
11. *It seems*, that defendant would have the right to describe his rooms as those formerly occupied by "Morgan & Schuyler," and himself as formerly, or late of that firm. *Id.*
12. In an action for an accounting, brought by the executors of a deceased partner against the surviving partner of a firm, a judgment was rendered directing defendant to pay over to a receiver a specified sum, and to turn over to him the partnership assets remaining, out of which the receiver was directed to pay plaintiffs, a sum stated, and to divide the residue; thereupon a judgment was docketed in favor of plaintiffs, against defendant, for the amount the latter was required to pay; on motion to vacate the docket in this particular, *held*, that it was not authorized by the judgment, and was properly vacated; that the docket, if any was authorized, should have been in favor of the receiver; that it was not sufficient that it appeared, plaintiffs would be entitled to as large or a larger sum when the judgment is fully carried out; there was no personal money judgment between the parties, the money required to be paid the receiver was partnership money, and the demand of plaintiffs was to be paid by the receiver from firm assets. *Geery v. Geery.* 565.
13. In an action for a dissolution of a co-partnership, and for an accounting between the partners, the answer alleged a violation on the part of plaintiff of a provision in the articles of co-partnership, providing for a sale of the good will of the business to such of the partners as should bid the highest price, by his appropriating to himself the good will, and that the same was worth as an asset \$200,000, which he asked to counterclaim against any sum found due the plaintiff. As a further counterclaim the answer alleged a fraudulent misappropriation by plaintiff of partnership funds. *Held*, that the matters so set up did not present a counter-claim, of a separate and distinct cause of

action, within the meaning of said section, that the matters set up were proper items to be proved upon an accounting; and that defendant was not entitled to a trial by jury thereon. *Cook v. Jenkins.*

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PAYMENT.

In an action upon a promissory note of \$2,400, it appeared that the note was indorsed by defendant W. for the accommodation of the makers, of which fact plaintiff had notice. The note was delivered by the makers to plaintiff's cashier, who indorsed it, and at their request procured it to be discounted by another bank, plaintiff receiving a compensation for procuring the discount. On, or prior to, the day the note fell due, the makers delivered to plaintiff another note, being one of several indorsed by W., and delivered to the makers to take up the note in suit, and other notes previously indorsed by him; plaintiff's cashier was directed to apply the proceeds to take up the paper so indorsed. It did not appear that this direction was revoked. The proceeds were credited to the makers. It did not appear that plaintiff, at that time, held any paper so indorsed by W., save the note in suit, which it had taken up. A few days after, the makers drew a check on, and delivered it to, plaintiff for \$2,731.62, payable to "notes, etc., or bearer." No money was paid the drawers thereon, and it did not appear that the proceeds of the note had been drawn out. *Held*, that the plain inference from the transaction was that the check was given to pay the note in suit, and that it was paid thereby; and that in the absence of any proof rebutting this presumption, a finding of non-payment was error. *National Bank of Gloversville v. Wells.*

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PERJURY.

— *What allegations sufficient in indictment for; and as to evidence on trial.*

See Eighmy v. People.

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PHYSICIAN AND SURGEON.

1. The prisoner was accused of having caused the death of W., the deceased, by poison. A physician who was called to see W. when sick from the poison, and who examined and prescribed for him, as a witness for the prosecution was asked to state the condition in which he found W. at that time, both from his own observation and what W. told him; this was objected to on the ground that the evidence was prohibited by the statute (Code of Civil Procedure, § 834). The court overruled the objection, and the witness stated what he learned from his own examination of W., made in the presence of W.'s wife and the prisoner, and from their statements. There was nothing of a confidential nature in anything he so learned. *Held*, that the evidence was competent. *Pierson v. People.*

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2. The object of the statute prohibiting the disclosure of professional information acquired by a physician in attending a patient, is to protect the latter, not to shield one charged with his murder. *Id.*

PLEADINGS.

1. The complaint in an action upon a contract made by commissioners of highways set forth the contract, in which the defendants were described as commissioners, and that they signed it as such; they were not described in the summons and complaint as commissioners, and judgment was asked against them personally. *Held*, that plaintiff was properly nonsuited, because defendants were not sued officially as commissioners; that under the statute providing for actions upon such contracts (2 R. S., 473, § 92), it was necessary to specify "in the process, pleadings and proceedings, their name of office;" that the statutory requirement was not merely formal, but matter of substance, to the end that the amount collected might be allowed in the official account of the commissioners (2 R. S., 476, § 108); also as i

affected the place of trial. *Boots v. Washburn.* 207

2. *It seems*, that the provision of the Code of Civil Procedure (§ 974), in reference to the mode of trial when defendant interposes a counter-claim, and demands an affirmative judgment, and an issue of fact is joined thereon, applies only when the counter-claim sets up matter for which a separate action might be maintained. *Cook v. Jenkins.* 575

8. A supplemental complaint should not be allowed upon an *ex parte* application. *Fleischmann v. Bennett.* 579

4. Notwithstanding the mandatory language of the Code of Civil Procedure (§ 544), it is the duty of the court, upon the application, to consider all the circumstances, and to grant or refuse it, as may be just and proper in the particular case; such application therefore should be upon notice, so that both parties may be heard. *Id.*

5. Where, upon the facts presented, the allowance of a supplemental pleading is in the discretion of the Supreme Court, the exercise of this discretion by the Special Term may be reviewed by the General Term, but not by this court. *Id.*

— *Where pleadings admit title in parties, this precludes objection that another has an interest, and should have been made a party.*

See Prentice v. Janssen. 478

See COUNTER-CLAIM.

POSSESSION.

See ADVERSE POSSESSION.

POLICE COURTS (NEW YORK CITY).

— *Commissioner of Public Works authorized to appoint janitors for buildings in which courts are held.*

See Kennedy v. The Mayor. 261

POWERS.

The will of B. authorized his son F. to carry on the hotel business for

five years, if he so desired, in a certain hotel owned by the testator, and empowered his executors to sell the hotel property, after the occupancy of his son had ceased, and divide the proceeds among his residuary legatees. F. died before the testator; no action was ever taken by the executors to sell the property. Three of the four legatees, or their successors in interest, conveyed their interest to plaintiff. Defendant M., the other legatee joined with the plaintiff in making leases of the property, and large sums were expended by them in making improvements. In an action for partition, the only surviving executor was made a party defendant, as the husband of M.; he did not, by his answer, claim any rights as executor, or that he was a proper party as such. *Held*, that the executors took no interest in the lands, but merely a power in trust, to be executed simply for the purposes of distribution, liable to be defeated by a re-conversion into realty of the property which was converted by the will into personalty; that the parties beneficially interested had a right to elect to make such a re-conversion, and their acts showed such an election; that the power of the sale thereby become extinguished, and the parties became owners as tenants in common, and so that a partition was proper; also that the surviving executor had no title, interest, or lien upon the property which rendered him a necessary party to the action as such executor; that the provision of the Revised Statutes (1 R. S., 735, § 107), which makes a power of sale a lien or charge upon land, had no application as the power had ceased to exist; also that equity would not interpose to compel the execution of the power (1 R. S., 734, § 96), as the purpose had been accomplished without its exercise. *Prentice v. Janssen* 478

PRACTICE.

1. In the absence of any motion or act, on the part of a defendant, upon the trial of an action from which an assent to a decision of

the case by the court, and a waiver of the right to go to the jury may be implied, an exception to a direction of a verdict for plaintiff is sufficient to present the point on appeal that there were questions of fact for the jury; it is not necessary to request the submission of any such fact. *First Nat. Bk. of Springfield v. Dana.* 108

2. Where a defendant does not accept an allegation of fact in the complaint, but gives evidence upon the trial in conflict with it, plaintiff is not precluded on appeal from claiming the fact to be as the evidence establishes it. *Cowing v. Altman.* 167

3. So, also, where the case is tried without reference to the pleadings, and no exception is taken raising the question that plaintiff is precluded thereby from showing the actual transaction, the question cannot be raised upon appeal. *Id.*

4. The complaint in an action upon a contract made by commissioners of highways set forth the contract, in which the defendants were described as commissioners, and that they signed it as such; they were not described in the summons and complaint as commissioners, and judgment was asked against them personally. *Held*, that plaintiff was properly nonsuited, because defendants were not sued officially as commissioners; that under the statute providing for actions upon such contracts (2 R. S., 473, § 92) it was necessary to specify "in the process, pleadings and proceedings their name of office;" that the statutory requirement was not merely formal, but matter of substance, to the end that the amount collected might be allowed in the official account of the commissioners (2 R. S., 476, § 108); also as it affected the place of trial. *Boots v. Washburn.* 207

5. Where an objection to evidence has once been made and overruled, it is not required to repeat the objection, where subsequent questions call for the same class of

evidence, relating to the same subject matter. *Church v. Howard.* 415

See PLEADING.
TRIAL

PRESUMPTION.

—Seal presumptive evidence of consideration.

See *Best v. Thiel.* 15

PRIVILEGED COMMUNICATIONS.

The object of the statute prohibiting the disclosure of professional information acquired by a physician in attending a patient, is to protect the latter, not to shield one charged with his murder. *Pierson v. People.* 424

PROHIBITION (WRIT OF).

Where a writ of prohibition is issued by the General Term of the Supreme Court, addressed to the Special Term, the inquiry thereon relates simply to the jurisdiction (chap. 70, Laws of 1873); an error or mistake in practice affords no foundation for the writ, unless it involves the doing of some thing "contrary to the general law of the land." *People ex rel. Mayor, etc. v. Nichols.* 583

QUEENS (COUNTY OF).

—Mechanics' lien law in.
See *Burkitt v. Harper.* 273

QUESTIONS OF LAW AND FACT.

1. While it is the province of the courts to construe contracts, yet where the meaning of a contract is obscure and depends upon facts *abundant*, in connection with the written language, the question of construction may be one of fact for the jury. *First Nat. Bk. of Springfield v. Dana.* 108

2. It is not, as matter of law, negligence for a person approaching a

railroad in a carriage, upon a highway, not to stop; his omission to do so is a fact to be submitted to the jury. *Kellogg v. N. Y. C. and H. R. R. Co.* 72

3. Under the Code of Civil Procedure (§ 1338), where on order of General Term, reversing a judgment entered upon the report of a referee, does not state that it was made on questions of fact it will be deemed to have been made on questions of law only. *Weyer v. Beach.* 409

—When question of negligence one of fact.

See *Kirkpatrick v. N. Y. C. and H. R. R. Co.* 240

See *Stackus v. N. Y. C. and H. R. R. Co.* 464

RAILROAD CORPORATIONS.

1. In proceedings under the provision of the railroad act (subd. 6, § 23, chap. 140, Laws of 1850) by one railroad company to acquire the right to cross the railroad of another company, the petition was verified by one styling himself the consulting engineer of the petitioning company; it did not appear that he was an officer of said company; the other company answered the petition on the merits and went to a hearing on the petition and answer; it did not appear that any objection was made as to the verification. *Held*, that it was too late to raise the objection on appeal to this court; that by omitting to raise it below, it was waived. (DANFORTH, J., dissenting.) *In re B., H. T. and W. R. R. Co.* 64
2. A defect in the verification of the petition is not a jurisdictional defect. (DANFORTH, J., dissenting.) *Id.*
3. The petition alleged the inability of the two companies to agree upon the points and manner of crossing, and the compensation to be made therefor; this was not denied in the answer, and there was no offer to disprove it. *Held*, that proof thereof was not required to be given by the petitioner. *Id.*
4. In such proceedings proof is not required on the part of the petitioner as to allegations of the petition not put in issue. *Id.*
5. Said act authorizes more than one crossing by a railroad company of the track of another road. *Id.*
6. The fact that the road of the petitioning company, at some points, is parallel with the road sought to be crossed, does not exclude said company from the provisions of the act. *Id.*
7. The points of crossing are not necessarily fixed by the notice of the location of the new road, and the failure of the company, whose road is sought to be crossed, to object within fifteen days. The general provisions of the statute in regard to such location, and the right of property owners to object, are not applicable. *Id.*
8. Objections to the proposed points of crossing, on the ground that they interfere with lands of the old company, already appropriated for stations, etc., are not proper to be raised on application for the appointment of commissioners; they are matters to be considered by the commissioners. *Id.*
9. *It seems*, that said act does not authorize the invasion of lands or buildings already appropriated to railroad uses which, in their nature, require an exclusive occupation, or which would be materially impaired by subjecting the land to the new use. *Id.*
10. *It seems*, also, that if the commissioners, in locating the crossings, violate the legal rights of the old company, in the respect last mentioned, their action is reviewable. *Id.*
11. So, also, *it seems* that the right to object to disturbance in the enjoyment of premises, devoted to public uses which require the enjoyment to be exclusive, is not waived or forfeited by an omission

to apply within the statutory time for a change of location.. *Id.*

12. Under the provisions of the railroad act (sub. 6, § 28, chap. 140, Laws of 1850), authorizing proceedings by one railroad company to acquire the right to cross the railroad of another company an attempt to agree with such other company as to the points and manner of crossing, and as to the amount of compensation, is a condition precedent to the authority of the court to appoint commissioners; and unless this is averred in the petition, there is no jurisdiction. *In re B., H. T. and W. R. R. Co.* 69

13. Where one railroad company has leased the road of another, such lessee is a necessary party to a proceeding under said provision by a third company, to acquire the right to cross the leased road; it may voluntarily agree with the petitioner in respect to the crossing, and such agreement, while not binding upon the lessor, in respect to its interests as reversioner, binds the interests of the lessee. *Id.*

14. In such case it is not essential that one proceeding shall embrace all the parties; it will only affect the parties brought in, and where the lessee is alone made a party, the estate in reversion will not be affected. *Id.*

15. Where, therefore, such proceedings were instituted nominally against both lessor and lessee, but the petition contained no allegations of an attempt to agree with the lessor as to the points or manner of crossing or compensation, but did contain such allegations as to the lessee, *held*, that an order granting the prayer of the petition was proper, so far as it provided for the appointment of commissioners, as against the lessee, but was erroneous so far as it affected the lessor. *Id.*

16. In an action to recover damages for alleged negligence, causing the death of C., plaintiff's testator, who was killed at a railroad cross-

ing, it appeared that the railroad track runs north and south, the highway east and west; at the crossing and on both sides thereof there was a cutting for the railroad track; and one also for the highway east of the track, seven or eight feet deep, for a considerable distance, with a board fence, and other obstructions to view on the top of the embankment to the south. C. approached the crossing from the east, in a one-horse wagon. He was driving at a very slow trot with one hand, holding a pail in the other; the train, by which he was killed, came from the south at a high rate of speed, and as plaintiff's evidence tended to show, without ringing a bell. C. was familiar with the crossing, and with the running of trains; he approached the crossing about the time trains were due both ways; the wind at the time was blowing from the north; C. was seen a moment before he was struck by the engine looking towards the north. *Held*, that the question of negligence on the part of defendant and contributory negligence on the part of C. were of fact for the jury. *Kellogg v. N. Y. C. and H. R. R. Co.* 72

17. In such an action evidence, on the part of the defendant, that the life of the deceased was insured is incompetent. *Id.*

18. Where the bonds of a town have been issued to a railroad corporation, in payment for stock, by commissioners appointed under and by a judgment, void for want of jurisdiction, rendered in proceedings under the act authorizing "municipal corporations to aid in the construction of railroads" (chap. 907, Laws of 1869), an equitable action is maintainable, under the act of 1872, for the protection of tax-payers, etc. (chap. 161, Laws of 1872), at the suit of a tax-payer of the town, to restrain the negotiation or payment of the bonds, and to compel their cancellation. *Metzger v. At. and Ar. R. Co.* 171

19. A railroad corporation owes a duty, to one employed upon one of

its engines, to see that the engine is fit and proper for his use in the performance of the labor he has undertaken; this duty is not discharged simply by employing fit and competent agents to supervise the engine, and see that it is in fit condition; any negligence on the part of such agents, in the performance of their duties in this respect, is the negligence of the corporation. *Kirkpatrick v. N. Y. C. and H. R. R. Co.* 240

20. In an action to recover damages for alleged negligence causing the death of K., plaintiff's intestate, it appeared that the death was caused by the explosion of the boiler of a locomotive upon which K. was employed as a fireman. Plaintiff's evidence tended to show that the engine was infirm and weak, was frequently, and from necessity, taken to the repair shops for repairs; that it was unable to hold water, or sustain a full head of steam. *Held*, that the question of defendant's negligence was one of fact for the jury. *Id.*

21. Upon the cross-examination of S., a witness for plaintiff, who had given material testimony for him, and who had been in defendant's employ, he was asked if he was discharged for inefficiency and drunkenness; if he was discharged at all; and if O., his "immediate boss," did not assign these reasons for discharging him, to all of which he answered, "No." O. was called by defendant's counsel, who offered to prove by him, that he became aware that S. was in the habit of being intoxicated, and neglected his duty, and that he was discharged for that reason. This was excluded. *Held*, no error; that the fact of his discharge was immaterial; that if the discharge was for inefficiency or drunkenness, this could not be proved by way of impeachment, and was matter collateral to the issue, as to which the answers of S. were conclusive; that if such grounds for the discharge were communicated to S., it might lay the foundation of an inquiry as to his feeling toward defendant;

but as defendant did not offer to show this, and as it was not disclosed on the trial that the offer was to show a hostile feeling, the question could not be presented here. *Id.*

22. The charter of Long Island City (chap. 461, Laws of 1871, tit 3, chap. 1, § 14) gives its common council power to regulate the use of streets by vehicles and railways, and to enforce obedience thereto by penalties, with the reservation that it shall have no power to prohibit or control, in any manner, the use of steam power on any railroad from any part of Long Island to the East river; and it is declared that such railroad companies shall have unobstructed right to run to the East river, "but shall furnish suitable guards or signals at the street crossings." The common council passed an ordinance requiring railroad companies running cars drawn by steam power, within the city limits, to place flagmen at every crossing, and for every violation of the ordinance imposed a penalty of fifty dollars. Defendant's road was constructed and in operation before the enactment of the charter. Its road passed through the city to the East river, crossing one of the city streets. In an action to recover a penalty for not placing a flagman at the crossing, *held*, that plaintiff was not entitled to recover; that it had no control over the defendant's road, and its common council had no power to regulate by ordinance the duty imposed upon defendant to furnish proper guards and signals. *Long Island City v. Long Island R. R. Co.* 561

RECEIVER.

1. A receiver of an insolvent life insurance company may, at any time, apply to the court for instructions in regard to any matter touching the fund placed in his custody. Especially is this so where the fund, through his error, is in danger of being unfairly distributed. *In re Pro. ex rel. v. Sec. L. Ins. and An. Co.* 267.

2. The receiver owes a like duty to all claimants upon the fund; and it is his duty, as far as possible, to see that each has an equal opportunity to enforce his claim. *Id.*
3. A receiver of such a company obtained an order as prescribed by statute (2 R. S., 467, § 56), for publication of notice to creditors, requiring them to exhibit their claims within a time specified. Before the expiration of the time the receiver addressed a circular to policy-holders, to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further proof; misled by such circular the holders of such policies did not make proof of their claims. These were objected to by other creditors, and were rejected by the referee to whom it was referred to take proof as to distribution of the assets. Whereupon, and before any dividend had been made, the receiver applied for and obtained an order giving two months further time within which such claims could be presented and established before the referee. *Hill*, that the receiver was authorized in making the application; that the court had power, in its discretion, to grant it; and that the exercise of this discretion was not reviewable here. *Id.*
- case he records his assignment before the first mortgage is recorded. (DANFORTH, J., dissenting.) *Id.*
3. *It seems*, that where, at the time of the execution of a mortgage, A., a third party, is in possession of the mortgaged premises, under an executory contract for the purchase thereof, and has made improvements thereon, and subsequently, and before the mortgage is recorded, A. takes a conveyance, in good faith, without knowledge of the mortgage, giving his bond and mortgage for the whole of the purchase-price, and the deed and subsequent mortgage are recorded before the prior mortgage, the title of A. is superior to the prior mortgage; and a purchaser upon foreclosure of the mortgage so given by A. takes all his title, and so takes the premises freed from the lien of the prior mortgage. *Id.*
4. In such case, for the purpose of determining the question of the lien of the prior mortgage, the legal title of A. will be considered as relating back to his equitable title, and is thus freed from the lien; but if by accepting a deed A. loses his equitable rights as vendee in possession under his contract, then he is protected by the recording act, as by parting with such rights he becomes a purchaser for value, and is entitled on that ground to priority, although he paid no portion of the purchase-money. *Id.*

RECORDING ACT.

1. To enable a subsequent purchaser to assail a prior unrecorded mortgage under the recording act (1 R. S., 756, § 1), it is incumbent upon him to show not only that he was a *bona fide* purchaser for value without notice, but that his conveyance was first recorded. *Westbrook v. Gleason.* 23
2. Where a junior mortgagee, with notice of a prior unrecorded mortgage, assigns his mortgage to a *bona fide* purchaser for value, who has no notice, the assignment is the "conveyance," within the meaning of said act (1 R. S., 762, §§ 37, 38), and such assignee is entitled to preference, only in
5. Defendant A. being the owner of certain premises, subject to a mortgage then on record, sold and conveyed a portion thereof to D. and M., which, as stated in the deed, was "supposed to be eighty acres," the grantor covenanting that in case of a deficiency she would pay therefor at the rate of thirty dollars per acre; the grantees, as the consideration for the conveyance, assumed and agreed to pay the whole mortgage; subsequently, it having been ascertained that there was a deficit in quantity of the land conveyed, A. executed to her said grantees a

writing agreeing that she would save them harmless, to the amount of \$273.32, the sum agreed to be paid for such deficit, from any claim under the mortgage. A subsequently conveyed the residue of the premises to other parties, covenantee that the same was free and clear of all incumbrances. In an action to foreclose the mortgage, *held*, that the grantees of such residue were entitled to no other or greater equities than those which A. had at the time she conveyed; that the residue was presumably chargeable in equity with the payment of \$273.32 of the mortgage, and the portion so conveyed to D. and M. was chargeable with the balance; that the fact that the covenant of D. and M. to pay the mortgage was contained in a deed on record was immaterial; as were also the facts that the agreement of A. to re-assume the amount of the rebate for the deficiency, was not on record, and that the grantees of the residue had no notice thereof. *Judson v. Dada*. 873

6. Such an agreement is not within the recording act. *Id.*

REDEMPTION.

1. After an illegal sale by commissioners for loaning money of the U. S., a mortgagor served upon the commissioners a notice in writing, offering to pay the amount of the mortgage, principal and interest, and to redeem the premises; also stating therein that she desired an accounting of the rents and profits, possession having been taken by the purchaser. The commissioners made no answer. In an action to redeem, *held*, that the omission to make tender was not fatal to the action, but that in any event it only affected the question of costs; that the plaintiff in such an action occupied the same position as any other mortgagor seeking to redeem; also, that plaintiff was entitled to an accounting from the purchaser and his successors in interest and possession for the rents and profits. *Thompson v. Commissioners*. 54

2. Also, *held*, that such an action, with all the parties brought in, was the proper remedy in such case. *Id.*

REFERENCE.

1. Upon a reference as to surplus moneys in a foreclosure suit, the referee has authority to inquire as to the validity of conveyances or liens; and conveyances as well as liens may be attacked as fraudulent. *Bergen v. Carman*. 146
2. Where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser has the right to impeach the conveyance upon such a reference; he is not bound to bring ejectment, or an action to set aside the conveyance. *Id.*
3. To sustain an exception to the refusal of a referee, to find facts as requested, it is incumbent upon the party to show that the material facts, so requested to be found, were established by uncontroverted evidence, and that if found they would have affected the result. *Stewart v. Morss*. 629
4. No question can be raised in this court, upon a matter of fact, in a case tried by a referee, as to which no facts were found by the referee, or requested to be found. *Id.*

RELIGIOUS CORPORATIONS.

1. A corporation chartered by special act may, by appropriate language, be made subject to the provisions of the general act of 1848 (chap. 319, Laws of 1848, amended by chap. 51, Laws of 1870), providing for the incorporation of benevolent and other societies, which restrict the capacity of such corporations to take under a will. *Kerr v. Dougherty*. 327
2. The provision of the act of 1870 (chap. 129, Laws of 1870), amending the act of 1839 (chap. 99, Laws of 1839), incorporating the Union

Theological Seminary of the city of New York, which limits the power of that corporation to take and hold by gift, grant or devise, by subjecting it "to all the provisions of law relating to devises and bequests by last will and testament," make applicable to said corporation the provision of said act of 1848 (§ 6), which declares that no devise or bequest to any corporation formed under it, by one leaving wife, child or parent, "shall be valid in any will which shall not have been made and executed at least two months before the death of the testator." (RAPALLO and EARL, JJ., dissenting.) *Id.*

8. The said provision of the amended charter also includes the provisions of the act of 1860 (chap. 36, Laws of 1860), "relating to wills," prohibiting devises or bequests to certain societies to more than one-half of the testator's estate. *Id.*
4. The said act of 1860 is not inconsistent with said two months clause in the act of 1848, and does not repeal it. *Id.*
5. The effect of the amendment of said charter, in the particular above mentioned, was not destroyed by the amendment of 1870 (chap. 51 Laws of 1870), to said act of 1848. *Id.*
6. Accordingly *held* (RAPALLO and EARL, JJ., dissenting), that a bequest to said corporation in the will of a man who died within a month after the execution thereof, leaving a wife surviving, was void. *Id.*
7. Also, *held* (RAPALLO and EARL, JJ., dissenting), that a bequest to the New York City Mission and Tract Society was void because of a similar provision of its charter (chap. 63, Laws of 1860). *Id.*
8. The provision of the act of the Legislature of Pennsylvania of 1853, relating to corporations, etc., which prohibits devises or bequests to any body politic, or person in trust, for religious or charitable uses, unless by will executed

at least one month before the death of the testator, relates to and affects the power to take as well as the power to devise (RAPALLO and EARL, JJ., dissenting). *Id.*

9. A religious corporation, therefore, of the said State cannot take a bequest to it in trust for such purposes contained in a will executed in this State by a citizen thereof within one month of his death: and such a bequest is void (RAPALLO and EARL, JJ., dissenting). *Id.*

REMAINDERS.

In 1808, Matthew and Martha Codd, the parents of plaintiff, being each the owner in fee of certain real estate, joined in a deed by its terms conveying to certain trustees named, "their heirs and assigns," all the lands, etc., of which the grantors, or either of them, were seized, in trust: 1st. To sell and dispose of so much thereof as should be necessary to pay all debts then subsisting against the grantors. 2d. To leave, etc., the residue, the net profits and avails to be paid Matthew during his life for the support of the grantors and their children; if Martha survived then to her during her life for the maintenance of herself and children. 3d. The trustees, the survivor of them and the heirs and assigns of said survivor, to hold all the residue not sold to pay debts, "for the sole use, benefit and behoof of such persons as shall be the right heirs" of the grantors at the time of the death of the survivor. Reserving to the grantors power by will or appointment to direct to whom, upon the death of the grantors, the residue of the estate should go. 4th. Upon request of the grantors, in the discretion of the trustees, to sell and convey any portion of said lands. Plaintiff was living at the time of the execution of this deed. Martha, the survivor of the grantors, died in 1871. In an action of ejectment, commenced in 1874, to recover lands of which Martha was seized in fee at the time the deed was executed, defendant claimed by

adverse possession commenced in 1842. *Hill* (RAPALLO, J., dissenting), that by the deed the whole estate in law and equity was vested in the trustees, subject only to the execution of the trust; that the persons for whose benefit the trust was created took no estate in the lands, but simply an equitable interest, a right to enforce the performance of the trust in equity; that upon the death of her mother plaintiff became entitled to the rents and profits and to the actual possession of the lands remaining in the hands of the trustees; but that the remainder in the plaintiff was limited upon the trust estate, and if by the acts or the negligence of the trustee their estate had been defeated, or their right of action for its possession barred, the remainder was defeated, and plaintiff's right of action also barred; and that therefore the adverse possession was a good defense. *Bennett v. Garlock.* 302

REMEDIES.

— *It seems, that where legacy is charged upon lands devised, payment may be enforced by suit in equity to charge the lands or by action against the devisee.*

See Brown v. Knapp. 136

— *Purchaser of lands on execution sale may, upon reference as to surplus moneys on foreclosure of prior mortgage thereon, impeach a fraudulent conveyance made by the judgment debtor; he is not obliged to bring ejectment or an action to set aside conveyance.*

See Bergen v. Carman. 146

RIPARIAN OWNER.

The right of a riparian proprietor to drain the surface-water on his lands into a stream which flows through them, is not an absolute one under all circumstances; it does not authorize the throwing into a small stream surface-water, by means of ditches and drains, when, by so doing, the stream will be filled beyond its natural capacity, and will overflow and flood

the lands of a lower proprietor. *Noonan v. City of Albany.* 470

RULES.

1. The rule of the Court of Chancery (rule 15.), requiring an infant to join when he is over fourteen years of age, was a mere regulation of practice, which the court had power to waive, and did not affect the jurisdiction or invalidate a sale under the proceedings. *Cole v. Gourlay.* 527
2. So, also, said court had power to dispense with the provision of said rule, requiring corroborating affidavits; and with that requiring the petition to be by the general guardian of the infant, or to show that he has none. *Id.*
3. A motion for judgment upon the return to a writ of certiorari in proceedings before the mayor of the city of New York to remove a police commissioner presents a question of law only, and comes within the class of non-enumerated motions as defined by Supreme Court rule thirty-eight. *People ex rel. Mayor, etc., v. Nichols.* 533
4. But if otherwise it is within the jurisdiction of the court to hear it at any Special Term, and upon such notice as shall be prescribed. *Id.*
5. A notice of less than eight days may be prescribed (Code of Civil Procedure, § 780, S. C. rule 87), by order to show cause. *Id.*
6. The power to shorten notice is not affected by the rule of the Supreme Court (rule 41), providing that a case on a certiorari may be brought to a hearing upon the usual notice of argument; the rule is binding only as it is consistent with the Code (§ 17). *Id.*

SALES.

Plaintiff's complaint alleged a sale and delivery to defendant of certain tools and machines. Plaintiff's evidence was to the effect

that by a contract between him and G., he sold and assigned to G. the articles in question with other property, the latter agreeing to start a manufacturing business, and to continue the same for two years, employing plaintiff therein, and paying him one-half the profits. At the expiration of the two years, if G. concluded to give up the business, he agreed to re-assign to plaintiff upon being refunded the sum paid, and certain expenses and disbursements; in case G. concluded to continue the business, he had the right so to do for three years longer on the same terms and conditions, and at the end of the three years he agreed to re-assign to plaintiff, on being re-imbursed as aforesaid, or to take plaintiff into partnership. Defendant subsequently agreed to pay plaintiff \$300 to release or transfer whatever rights he had under the contract to G., so that the latter might convey to defendant's son a clear title to the property; this plaintiff did, and G. conveyed. Plaintiff asked to recover the \$300. Defendant moved for a nonsuit, on the ground that the evidence failed to establish a sale and delivery of goods as alleged in the complaint. No attempt was made to obviate the objection by amendment, and the motion was granted. *Held*, no error; that the contract between plaintiff and G. conveyed the legal title to the property in question to the latter, plaintiff retaining no interest, the transfer of which could be treated as a sale and delivery of goods; that assuming plaintiff had an equitable interest, an agreement to pay for a release of this interest could not sustain the action. *Harris v. Kasson.* 381

— *Sales by loan commissioners, when invalid.*

See Thompson v. Commissioners. 54

See VENDOR AND PURCHASER

SAVINGS BANKS.

1. Defendant T. was one of the trustees of a savings bank; to make up a deficiency in the assets

of the bank, caused by a loss upon a loan made by it, he executed a mortgage to H., who assigned it to the bank. In an action to foreclose the mortgage, *held*, that T. in executing it did not thereby become a surety or obligor for moneys loaned by the bank, within the meaning of the provisions of the act of 1875, in relation to savings banks (§ 21, chap. 371, Laws of 1875), which prohibits a trustee from becoming such surety or obligor; and so, that the mortgage was not invalid as violative of that provision. *Best v. Thiel.* 15

2. The claim was made that the trustees of the bank were personally liable for the deficiency. The superintendent of the banking department informed them that they were so liable, and that this liability would be enforced unless they made up the deficiency; and upon his requirement the mortgage was executed. T. set up want of consideration as a defense. *Held*, untenable. 1st. The seal was presumptive evidence of a consideration, which presumption was not clearly overcome. 2nd. T. was estopped from denying the legal validity of the mortgage as it was with his knowledge and assent reported to the bank department and represented to the depositors of the bank as a portion of its assets, and upon the strength thereof and other similar securities, the bank was permitted to continue its business. *Id.*

— *Commercial paper discounted by, void; but action may be maintained to recover the money loaned.*

See Pratt v. Short. 437

Pratt v. Eaton 449

SERVICES.

1. The rule of law that, from a request to perform services, an implied promise arises to pay what the services are worth, does not apply where the services are rendered by one in the employ of the person making the request; in such case the implication is that the services were rendered under the contract of employment, par-

ticularly if the services are of the same character as those embraced in that contract. *Ross v. Hardin*.

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2. As to whether a contract may be made by a person during his life, for the preservation and safety of his property after his death, and until administrators are appointed, *quære*. *Id.*

3. If such a contract can be so made with an employe who has had similar services to perform during the life of the employer, unless the parties stipulate for a different compensation, it will be presumed that the same rate of compensation paid before the death of the employer continues thereafter. *Id.*

4. Plaintiff prior to the death of H., defendant's intestate, had been in his employ as confidential clerk, at a salary of sixty dollars per month. H. owned a large amount of stocks, bonds, securities and money, which were kept in a box deposited in a bank. Plaintiff frequently had charge of them; he brought the box to the house of H. at his request. Two days before his death, H. told plaintiff to take charge of the box, and put it in the Safe Deposit Company; this he did. Eight days after the death of H., and upon the appointment of defendants as administrators, plaintiff delivered the box to them. In an action to recover the value of the services so rendered, plaintiff was nonsuited. *Held*, that conceding the employment valid, and the estate liable, plaintiff was entitled to recover only at the same rate of compensation he received during the life of H., and the nonsuit was not strictly correct; but as this claim was not made upon the trial or in this court, plaintiff claiming to be entitled to compensation as upon a *quantum meruit*, the maxim "*de minimis non curat lex*" would be applied; judgment, therefore, affirmed. *Id.*

SHERIFF.

Defendant, in January, 1877, as sheriff levied under an execution

upon certain goods belonging to P., the judgment debtor, and took possession. On February 3d, 1877, P. made a general assignment for the benefit of creditors. An attachment against the property of P. was issued to defendant, February 6th. He sold sufficient of the property to satisfy the execution, and then, upon demand of the assignee and refusal of the attachment creditors to indemnify, delivered the residue to the assignee and returned *nulla bona* to the attachment and the execution issued upon judgment in the attachment suit. In an action for a false return there was evidence that defendant assumed to levy under the attachment; *held*, that by surrendering the property without calling a jury to pass upon the title, as prescribed by the statute (2 R. S., 4, § 10), defendant assumed the burden of showing that the property was not subject to the attachment; but that the facts established that defense; and, being undisputed, the complaint was properly dismissed. *Mumper v. Rushmore*. 19

STATUTES.

Where a prohibitory statute points out the consequences of its violation, and it appears to have been the legislative intent to exclude any other penalty or forfeiture than such as is declared in the statute, no other will be enforced; and an action may be maintained upon the transaction, of which the prohibited act was a part, if it can be done without sanctioning the illegality. *Pratt v. Short*. 437

— Chap. 371, Laws of 1875.

See *Best v. Thiel*, 15.

— 2 R. S., 136, § 5.

— 2 R. S., 4, § 10.

See *Mumper v. Rushmore*, 19.

— 1 R. S., 756, § 1.

— 1 R. S., 762, §§ 37, 38.

See *Westbrook v. Gleason*, 23.

— 2 R. S., 96, § 75.

See *Ades v. Campbell*, 52.

— Chap. 150, Laws of 1837.

See *Thompson v. Commissioners*, 54.

— Chap. 140, *Laws of 1850*.
See In re B. H. T. and W. R. W. Co., 64.
See In re B. H. T. and W. R. W. Co., 69.
 — 2 R. S., 137, § 5.
See Stearns v. Gage, 102.
 — 2 R. S., 88, § 34, *et seq.*
See Cornes v. Wilkin, 129.
 — Chap. 907, *Laws of 1860*.
 — Chap. 161, *Laws of 1872*.
See Metzger v. A. and A. R. R. Co., 171.
 — Chap. 263, *Laws of 1865*.
 — Chap. 425, *Laws of 1873*.
See People ex rel. Sage v. Schuyler, 189.
 — Chap. 103, *Laws of 1858*.
 — Chap. 412, *Laws of 1865*.
 — 2 R. S., 473, § 92.
 — 2 R. S., 476, § 108.
See Boals v. Washburn, 207.
 — Chap. 545, *Laws of 1874*.
 — Chap. 479, *Laws of 1875*.
See Gordon v. Hartman, 221.
 — 2 R. S., 97, § 76.
 — 1 R. S., 752, § 23.
See Beebe v. Estabrook, 246.
 — 2 R. S., 309, §§ 36, 37.
 — Chap. 485, *Laws of 1862*.
See Sacia v. O'Connor, 260.
 — 2 R. S., 467, § 56.
See In re Att'y-Gen'l., 267.
 — Chap. 476, *Laws of 1862*.
See Burkitt v. Harper, 273.
 — Chap. 575, *Laws of 1872*.
See People ex rel. v. Livingston, 279.
 — Chap. 547, *Laws of 1864*.
See Sweet v. B. N. Y. and P. R. Co., 293.
 — Chap. 319, *Laws of 1848*.
 — Chap. 51, *Laws of 1870*.
 — Chap. 129, *Laws of 1871*.
 — Chap. 99, *Laws of 1839*.
 — Chap. 300, *Laws of 1850*.
 — Chap. 63, *Laws of 1866*.
See Kerr v. Dougherty, 327.
 — Chap. 566, *Laws of 1871*.
See In re Van Buren, 384.
 — 1 R. S., 739, § 147.
 — 2 R. S., 235, § 36.
 — Chap. 40, *Laws of 1848*.
See Losee v. Bullard, 404.
 — Chap. 402, *Laws of 1854*.
 — Chap. 58, *Laws of 1869*.
 — Chap. 489, *Laws of 1873*.
See Weyer v. Beach, 409.
 — Chap. 816, *Laws of 1868*.
 — 1 R. S., 712, §§ 3, 6.
See Pratt v. Short, 437.
 — Chap. 816, *Laws of 1868*

— 1 R. S., 712, §§ 3, 6.
See Pratt v. Short, 437.
 — Chap. 423, *Laws of 1871*.
 — 1 R. S., 600, § 8.
 — Chap. 123, *Laws of 1873*.
See U. H. Co. v. Hirsch, 454.
 — 1 R. S., 705, § 107.
 — 1 R. S., 724, § 96.
See Prentice v. Janssen, 473.
 — Chap. 579, *Laws of 1873*.
See Curnen v. The Mayor, 511.
 — 1 R. S., 749, § 3.
 — 2 R. S., 104, § 170.
See Cole v. Courlay, 527.
 — 1 R. S., 768, § 5.
See I. N. Bank v. Alley, 526.
 — Chap. 461, *Laws of 1871*.
See L. I. City v. L. I. R. R. Co., 561.
 — Chap. 335, *Laws of 1873*.
 — Chap. 71, *Laws of 1873*.
See People ex rel. v. The Mayor, 582.
 — Chap. 390, *Laws of 1879*.
See Ryan v. People, 593.
 — Chap. 90, *Laws of 1860*.
See Wing v. Schramm, 619.
 — Chap. 383, *Laws of 1869*.
See Guest v. City of B. (Mem.), 624.
 — 1 R. S., 769, § 11.
 — 2 R. S., 185, § 2.
See Matteson v. Moulton (Mem.), 627.

STATUTE OF FRAUDS.

1. Where personal property has been levied upon under an execution, and is in the possession of the sheriff at the time of an assignment by the judgment debtor for the benefit of his creditors, the transaction is not within the provision of the statute of frauds (2 R. S., 136, § 5), which requires an immediate delivery of goods sold; that applies only to a sale of goods in the vendor's possession or under his control.
Mumper v. Rushmore 19
2. A purchaser, for a valuable consideration, is not chargeable with constructive notice that the conveyance to him was made by his vendor with intent to defraud creditors; actual notice is required to impair or affect his title. (2 R. S., 157, § 5.) *Stearns v. Gage*.

3. Where it appeared that the drawee of a bill of exchange promised to pay the amount by the time or upon a contingency named, and that the payee, relying upon this, permitted the bill to remain in the hands of the former, and no demand or request for its return, and a denial or evasion thereof was proved, *held*, that the promise to pay was void under the statute of frauds (2 R. S., 135, § 2), as it was an oral promise to answer for the debt of another. *Matteson v. Moulton*. 628

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STOCK.

Where by the charter of a corporation the right is reserved to the Legislature to alter or repeal it, a subscriber to its capital stock is not discharged from his subscription by a subsequent amendment to the charter, but will be regarded as having consented to the change. *Un. Hotel Co. v. Hersee*. 454

STOCKHOLDER.

—*Liability of, on subscription for stock.*
See *U. H. Co. v. Hersee*. 454

SUBMISSION OF CONTROVERSY.

Plaintiff was appointed by the commissioner of public works in the city of New York janitor of the building occupied by the police court of the second district, and by the district or civil court of the third district; the justice of the latter court appointed C. janitor for that court. The board of estimate and apportionment made an appropriation for the salary of one janitor for said building, conditioned however, substantially, that no portion thereof should be paid by the comptroller to either appointee until the question was judicially determined that he was and that the other was not entitled

to be paid. *Held*, that the appropriation could only be availed of in an action or submission, to which both claimants were parties, and then only on establishing that the power to appoint janitors was exclusive, either in the court or the commissioner, and that there could be but one janitor; and that, therefore, plaintiff was not entitled to judgment upon a submission of the controversy under the Code of Civil Procedure (§ 1279) as between him and the city, to which C. was not a party. *Kennedy v. Mayor, etc.* 361

SURPLUS MONEYS.

1. Where an order of General Term, reversing an order of Special Term, as to the disposition of surplus moneys in a foreclosure suit, and sending the case back to the referee, imposes costs absolutely, in this respect it is a final decision, and an appeal to this court can be taken. *Bergen v. Carman*. 146
2. *It seems*, that in the absence of such a provision as to costs the order is not appealable. *Id.*
3. Upon a reference as to surplus moneys in such an action, the referee has authority to inquire as to the validity of conveyances or liens; and conveyances, as well as liens, may be attacked as fraudulent. *Id.*
4. Where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser has the right to impeach the conveyance upon such a reference; he is not bound to bring ejectment, or an action to set aside the conveyance. *Id.*

TENANTS IN COMMON AND JOINT TENANTS.

The court has power, in an action for partition, where the parties are tenants in common of real or personal estate, to direct a sale of the whole in one parcel, where the

interests of the parties will be promoted by such sale. *Prentice v. Janssen.* 478

TENDER.

— *Failure to tender, when not fatal to action to redeem.*

See Thompson v. Commissioners. 54

TITLE.

1. Notwithstanding a levy under an execution upon his personal property, the judgment debtor remains owner; and can convey title, subject to the lien created by the execution. *Mumper v. Rushmore.* 19
2. An assignee for the benefit of creditors, of the debtor, acquires a title subject to such lien, good against all persons until the assignment is impeached for fraud. *Id.*
3. Plaintiffs entered into a contract with S. & G., by which the former agreed to malt for the latter 25,000 bushels of barley from October 1, 1875, to June 1, 1876, at a price specified. Plaintiffs were to purchase the barley, and ship the malt when directed by S. & G., who were to have the increase, S. & G., agreed to accept plaintiffs' drafts "in payment for the purchase of the barley," or to furnish satisfactory notes. At the close of each month plaintiffs were to furnish a statement of the amount malted, and on presentation S. & G. agreed to pay the price for malting. S. & G. also agreed to pay interest, exchange and insurance on the barley and malt from the time the barley was paid for by plaintiffs until the malt was delivered. Plaintiffs were authorized to retain and hold as security, after June first, a sufficient amount of the malt to pay any notes or drafts then unpaid. In an action for malt manufactured under the contract, but not delivered or paid for, which had been levied upon by defendant as sheriff, under and by virtue of an execution against S. & G., *held,*

that the legal title in the malt was in the plaintiffs until paid for, and that S. & G. had no leviable interest therein. *Tutbill v. Bogart.* 215

TOWN BONDING.

Where the bonds of a town have been issued to a railroad corporation, in payment for stock, by commissioners appointed under and by a judgment, void for want of jurisdiction, rendered in proceedings under the act authorizing "municipal corporations to aid in the construction of railroads" (chap. 907, Laws of 1869), an equitable action is maintainable, under the act of 1872, for the protection of tax-payers, etc. (chap. 161, Laws of 1872), at the suit of a tax-payer of the town, to restrain the negotiation or payment of the bonds, and to compel their cancellation. *Metzger v. At. and Ar. R. R. Co.* 171

TRIAL.

1. Plaintiff prior to the death of H., defendant's intestate, had been in his employ as confidential clerk, at a salary of sixty dollars per month. H. owned a large amount of stocks, bonds, securities and money, which were kept in a box deposited in a bank. Plaintiff frequently had charge of the box; he brought the box to the house of H. at his request. Two days before his death, H. told plaintiff to take charge of the box, and put it in the Safe Deposit Company; this he did. Eight days after the death of H., and upon the appointment of defendants as administrators, plaintiff delivered the box to them. In an action to recover the value of the services so rendered, plaintiff was nonsuited. *Held,* that conceding the employment valid, and the estate liable, plaintiff was entitled to recover only at the same rate of compensation he received during the life of H., and the nonsuit was not strictly correct; but as this claim was not made upon the trial or in this court, plaintiff claiming to be entitled to compensation as upon a *quantum meruit*, the maxim

- "*de minimis non curat lex*" would be applied; judgment, therefore, affirmed. *Ross v. Hardin.* 84
2. In the absence of any motion or act, on the part of a defendant, upon the trial of an action from which an assent to a decision of the case by the court, and a waiver of the right to go to the jury may be implied, an exception to a direction of a verdict for plaintiff is sufficient to present the point on appeal that there were questions of fact for the jury; it is not necessary to request the submission of any such fact. *First Nat. Bank of Springfield v. Dana.* 108
 3. Where a defendant does not accept an allegation of fact in the complaint, but gives evidence upon the trial in conflict with it, plaintiff is not precluded on appeal from claiming the fact to be as the evidence establishes it. *Cowing v. Altman.* 167
 4. So, also, where the case is tried without reference to the pleadings, and no exception is taken raising the question that plaintiff is precluded thereby from showing the actual transaction, the question cannot be raised upon appeal. *Id.*
 5. After a party has been permitted to examine a witness at length in reference to a transaction, it is in the discretion of the court to exclude further examination upon the subject, and its decision is not reviewable here. *Id.*
 6. H. Bros., induced by fraudulent representations of S., sold to him a quantity of furniture, which was retaken by B, defendant's intestate, as sheriff, by virtue of a requisition in an action of replevin, brought by the vendors against the fraudulent vendee. In an action for the alleged unlawful taking and conversion of the property, plaintiffs' testator claimed title under a bill of sale from S. and wife which recited a consideration. No other proof of consideration was given. Defendant proved by the wife of S. that no consideration was paid at the time the bill of sale was executed, and the only inference if any which could be drawn from the testimony was, that the bill of sale was taken in payment or as security for a precedent debt. *Held*, that the complaint was properly dismissed; that if the recital in the bill of sale was any evidence as against the sheriff or H. Bros., the evidence of Mrs. S. destroyed any presumption arising therefrom. *Stevens v. Brennan.* 254
 7. Plaintiff's counsel asked to go to the jury on the question of possession at the time the goods were taken by the sheriff, which was denied. *Held*, no error; that the question as to the possession of the goods was not important, as, if in possession of plaintiffs' testator, the sheriff, acting for H. Bros., had a right to take them unless the former was a *bona fide* purchaser for value. *Id.*
 8. To the question asked Mrs. S. as to whether any money was paid by plaintiffs' testator when the bill of sale was given, plaintiffs' counsel interposed a general objection, which was overruled and exception taken. *Held*, that the exception did not present the question as to the competency of the witness to testify under section 399 of the Code of Procedure. *Id.*
 9. A general objection to a question can only be considered as applying to the competency or materiality of the point sought to be proved, and not to the competency of the witness to testify upon the subject. *Id.*
 10. In an action of *quo warranto* wherein the ballot-boxes in the city of Brooklyn were produced and the ballots received in evidence to impeach the accuracy of the returns of the inspectors of election, and wherein it appeared that the boxes had not been sealed up by the canvassers, and had been kept insecurely, so that the question whether the ballots were the identical ones voted was one of fact for the jury, the court instructed the jury, in substance, that to justify their rejection, it

must appear affirmatively by direct evidence, or from circumstances, that the boxes had been tampered with, *held*, error, and that the error was fatal to the judgment. *Pec. ex rel. Dailey v. Livingston.* 279

11. It is not essential, in an exception to a portion of a charge, to repeat the language excepted to, although this is strictly the more accurate practice; it is sufficient if the portion objected to is pointed out with such accuracy that there can be no misapprehension as to the application of the exception. *Id.*

12. Plaintiff's complaint alleged a sale and delivery to defendant of certain tools and machines. Plaintiff's evidence was to the effect that by a contract between him and G., he sold and assigned to G. the articles in question with other property, the latter agreeing to start a manufacturing business, and to continue the same for two years, employing plaintiff therein, and paying him one-half the profits. At the expiration of the two years, if G. concluded to give up the business, he agreed to re-assign to plaintiff upon being refunded the sum paid, and certain expenses and disbursements; in case G. concluded to continue the business, he had the right so to do for three years longer on the same terms and conditions, and at the end of the three years he agreed to re-assign to plaintiff, on being re-imbursed as aforesaid, or to take plaintiff into partnership. Defendant subsequently agreed to pay plaintiff \$300 to release or transfer whatever rights he had under the contract to G., so that the latter might convey to defendant's son a clear title to the property; this plaintiff did, and G. conveyed. Plaintiff asked to recover the \$300. Defendant moved for a nonsuit, on the ground that the evidence failed to establish a sale and delivery of goods as alleged in the complaint. No attempt was made to obviate the objection by amendment, and the motion was granted. *Held*, no error; that the contract between

plaintiff and G. conveyed the legal title to the property in question to the latter, plaintiff retaining no interest, the transfer of which could be treated as a sale and delivery of goods; that assuming plaintiff had an equitable interest, an agreement to pay for a release of this interest could not sustain the action. *Harris v. Kasson.* 381

13. Where an objection to evidence has once been made and overruled, it is not required to repeat the objection, where subsequent questions call for the same class of evidence, relating to the same subject matter. *Church v. Howard.* 415

14. In an action for negligence, to justify a nonsuit on the ground of contributory negligence, the undisputed facts must show the omission or commission of some act which the law adjudges negligence; the negligence must appear so clearly that no construction of the evidence or inference drawn from the facts will warrant a contrary conclusion. *Stackus v. N. Y. C. and H. R. R. Co.* 464

15. *It seems*, that the provision of the Code of Civil Procedure (§ 974), in reference to the mode of trial when defendant interposes a counter-claim, and demands an affirmative judgment, and an issue of fact is joined thereon, applies only when the counter-claim sets up matter for which a separate action might be maintained. *Cook v. Jenkins.* 575

16. In an action for a dissolution of a copartnership, and for an accounting between the partners, the answer alleged a violation on the part of plaintiff of a provision in the articles of copartnership, providing for the sale of the good will of the business to such of the partners as should bid the highest price, by his appropriating to himself the good will, and that the same was worth as an asset \$200,000, which he asked to counter-claim against any sum found due the plaintiff. As a further counter-claim the answer alleged a fraudulent misappro-

appropriation by plaintiff of partnership funds. *Held*, that the matters so set up did not present a counter-claim, of a separate and distinct cause of action, within the meaning of said section; that the matters set up were proper items to be proved upon an accounting; and that defendant was not entitled to a trial by jury thereon. *Id.*

17. As to whether a separate cause of action could be maintained to recover the value of the good will, or for damages without an equitable accounting of the copartnership affairs, *quære*. *Id.*

18. Where the deposition of a party, taken before trial, is read thereon without objection, he is not thereby precluded from being examined on trial. *Misland v. Boynton*. 630

19. Where evidence which is entirely collateral is drawn out on cross-examination, it cannot be contradicted. *Id.*

— Where party has given evidence of a certain character, he cannot object to similar evidence upon the opposite side.

See Scattergood v. Wood. 263

See CRIMINAL TRIAL.

TRUSTS AND TRUSTEES.

1. Defendant T. was one of the trustees of a savings bank, to make up a deficiency in the assets of the bank, caused by a loss upon a loan made by it, he executed a mortgage to H., who assigned it to the bank. In an action to foreclose the mortgage, *held*, that T. in executing it did not thereby become a surety or obligor for moneys loaned by the bank, within the meaning of the provision of the act of 1875, in relation to savings banks (§ 21, chap. 371, Laws of 1875), which prohibits a trustee from becoming such surety or obligor; and so, that the mortgage was not invalid as violative of that provision. *Best v. Thiel*. 15

2. In 1808, Matthew and Martha Codd, the parents of plaintiff, be-

ing each the owner in fee of certain real estate, joined in a deed by its terms conveying to certain trustees named, "their heirs and assigns," all the lands, etc., of which the grantors or either of them, were seized, in trust: 1st. To sell and dispose of so much thereof as should be necessary to pay all debts then subsisting against the grantors. 2d. To lease, etc., the residue, the net profits and avails to be paid Matthew during his life for the support of the grantors and their children; if Martha survived then to her during her life for the maintenance of herself and children. 3d. The trustees, the survivor of them and the heirs and assigns of said survivor, to hold all the residue not sold to pay debts, "for the sole use, benefit and behoof of such persons as shall be the right heirs" of the grantors at the time of the death of the survivors; reserving to the grantors power by will or appointment to direct to whom, upon the death of the grantors, the residue of the estate should go. 4th. Upon request of the grantors, in the discretion of the trustees, to sell and convey any portion of said lands. Plaintiff was living at the time of the execution of this deed. Martha, the survivor of the grantors, died in 1871. In an action of ejectment, commenced in 1874, to recover lands of which Martha was seized in fee at the time the deed was executed, defendant claimed by adverse possession commenced in 1842. *Held* (RAPALLO, J., dissenting), that by the deed the whole estate in law and equity was vested in the trustees, subject only to the execution of the trust; that the persons for whose benefit the trust was created took no estate in the lands, but simply an equitable interest, a right to enforce the performance of the trust in equity; that upon the death of her mother plaintiff became entitled to the rents and profits and to the actual possession of the lands remaining in the hands of the trustees; but that the remainder in the plaintiff was limited upon the trust estate, and if by the acts or the negligence of the trustee their estate had been defeated, or their right of action

for its possession barred, the remainder was defeated, and plaintiff's right of action also barred; and that therefore the adverse possession was a good defence. *Bennett v. Garlock.* 302

3. Where a trustee of a manufacturing corporation has become liable for a debt of the corporation, because of failure to make and file an annual statement as required by the statute (§ 12, chap. 40, Laws of 1848), the statute of limitations then begins to run as to that debt, and the right of action is barred in three years thereafter, although the default is continued during successive years; the continuance of the default does not revive the liability or create a new one. *Loose v. Bulard.* 404

4. A technical dissolution of such a corporation is not necessary to relieve a trustee from the consequences of not filing an annual statement thereafter; it is sufficient if the organization has been practically abandoned. *Id.*

USURY.

1. In an action to foreclose a mortgage for \$3,500, the defense was usury. The court found that the mortgage and accompanying bond were executed to one H., not as a security, but only for the purpose of being sold to plaintiff at a discount; that they were so sold and were usurious. Defendant's evidence was to the effect that F., the mortgagor, before the execution of the bond and mortgage, applied to plaintiff for a loan of \$2,500, that plaintiff directed him to go and make a mortgage to somebody else, that he could buy it of them, and would loan the money. No terms of loan were stated, and no property specified to be mortgaged. H. held judgments against F. to the amount of about \$900. The bond and mortgage were executed to secure this indebtedness. H. also advanced thereon \$320, and it was understood that the balance realized on sale of the securities after paying the judgments and the money advanced was to be

paid to F. They were offered to other parties before plaintiff purchased, and were sold to him at a discount. *Held*, that the evidence did not sustain the finding; that the defense of usury was not made out, but only as to part of the sum secured a failure or want of consideration; that the bond and mortgage were valid securities in the hands of H. for the amount of his judgments and the sum advanced by him, and to that extent, at least, plaintiff, standing in the place of H., could enforce them. *Sickles v. Flanagan.* 224

2. As to whether plaintiff would be entitled to recover any more than the amount due H., *quære.* *Id.*

VENDOR AND PURCHASER.

1. Where a sale of goods has been induced by fraud on the part of the vendee, the vendor may reclaim and retake them from the possession of any one, except a transferee in good faith, and for a valuable consideration paid at the time of the transfer. *Stevens v. Brennan.* 254
2. A transfer by the fraudulent purchaser, as security for or in payment of a precedent debt, does not make the transferee a *bona fide* purchaser within the rule, so as to enable him to hold the goods against the original vendor. *Id.*
3. In a suit by such vendor to recover the goods from one claiming title under the fraudulent vendee, the burden is upon the latter of showing that he is a purchaser in good faith and for value. *Id.*
4. H. Bros., induced by fraudulent representations of S., sold to him a quantity of furniture, which was retaken by B., defendant's intestate, as sheriff, by virtue of a requisition in an action of replevin, brought by the vendors against the fraudulent vendee. In an action for the alleged unlawful taking and conversion of the property, plaintiff's testator claimed title under a bill of sale from S. and wife which recited a considera-

tion. No other proof of consideration was given. Defendant proved by the wife of S. that no consideration was paid at the time the bill of sale was executed, and the only inference if any which could be drawn from the testimony was, that the bill of sale was taken in payment or as security for a precedent debt. *Held*, that the complaint was properly dismissed; that if the recital in the bill of sale was any evidence as against the sheriff or H. Bros., the evidence of Mrs. S. destroyed any presumption arising therefrom. *Id.*

WAIVER.

Upon the trial of an indictment for murder, the prisoner challenged the array of jurors on the ground that an order having been granted requiring the drawing of additional jurors, one of the boxes required to be kept by the clerk, *i. e.*, that containing the names of jurors who had attended a term of the court, and served, had not been kept, and was not brought into court as required by the Code of Civil Procedure (§ 1059). The challenge was sustained; the prisoner thereupon withdrew it; a jury was empaneled, and the trial proceeded. *Held*, that the prisoner could withdraw his challenge, and that he thereby waived the irregularity. *Pierson v. People.* 424

— Of conditions in policy of insurance, what amounts to.

See Richmond v. N. F. Ins. Co. 200

WASTE.

In an action for the foreclosure of a mortgage, after judgment, and a sale in pursuance thereof, and while awaiting the confirmation of the court for the payment of the purchase money and the delivery of the deed, the court has authority on the petition of the purchaser to restrain the mortgagor from committing waste. *Mut. L. Ins. Co. v. Bigler.* 568

WATER-COURSES.

1. A municipal corporation has no greater right than an individual to collect the surface-water from its lands and streets into an artificial channel, and to discharge them upon the lands of another. *Noonan v. City of Albany.* 470
2. The right of a riparian proprietor to drain the surface-water on his lands into a stream which flows through them, is not an absolute one under all circumstances; it does not authorize the throwing into a small stream surface-water, by means of ditches and drains, when, by so doing, the stream will be filled beyond its natural capacity, and will overflow and flood the lands of a lower proprietor. *Id.*

WILLS.

1. Plaintiff's father, who was the son of B., the testator, entered the military service of the United States in 1853. Before he entered the service B. said to him, that if he never returned his wife and son would always be cared for. After his departure B. took plaintiff and his mother to his (B.'s) house to live. Plaintiff's father died in the service; plaintiff and his mother continued to live with B., being supported by him until his death; plaintiff was at that time about seven years old. By his will B. gave to plaintiff \$3,000, which he directed his executor to pay when plaintiff attained the age of twenty-one years. The residue of his "real and personal estate" B. gave to his son W., whom he appointed executor. W. qualified and took possession of the estate. Plaintiff had no property, except that given him by the will. *Held*, that the evidence authorized a finding that the testator assumed the paternal care of plaintiff; that he was entitled to interest upon the legacy at the rate of six per cent per annum from the death of the testator, during his minority; and that W. was personally liable therefor. *Brown v. Knapp.* 187

2. The will gave to a daughter of the testator \$4,000, to be invested by the executor "for her use, support and maintenance during her natural life," with directions that if the interest should prove insufficient, the executor should apply so much of the principal as should be necessary for her support. *Held*, that the presumption in favor of plaintiff, as to interest, was not overthrown by the language used in this bequest. *Id.*
3. The action was in form against W., as executor; the objection as to form was not taken below. *Held*, that while it would have been more proper to have brought suit against W., individually, yet, as the result is the same and as the objection, if it could be raised here was merely technical affecting no substantial right, the action would be treated as one to enforce the personal liability of W. *Id.*
4. A corporation chartered by special act may, by appropriate language, be made subject to the provisions of the general act of 1848 (chap. 819, Laws of 1848, amended by chap. 51, Laws of 1870), providing for the incorporation of benevolent and other societies, which restricts the capacity of such corporations to take under a will. *Kerr v. Dougherty*. 827
5. The provision of the act of 1870 (chap. 129, Laws of 1870), amending the act of 1869 (chap. 99, Laws of 1869), incorporating the Union Theological Seminary of the city of New York, which limits the power of that corporation to take and hold by gift, grant or devise, by subjecting it "to all the provisions of law relating to devises and bequests by last will and testament," makes applicable to said corporation the provision of said act of 1848 (§ 6), which declares that no devise or bequest to any corporation formed under it, by one leaving wife, child or parent, "shall be valid in any will which shall not have been made and executed at least two months before the death of the testator." (RAPALLO and EARL, JJ., dissenting.) *Id.*
6. The said provision of the amended charter also includes the provisions of the act of 1860 (chap. 860, Laws of 1860), "relating to wills," prohibiting devises or bequests to certain societies to more than one-half of the testator's estate. *Id.*
7. The said act of 1860 is not inconsistent with said two months clause in the act of 1848, and does not repeal it. *Id.*
8. The effect of the amendment of said charter, in the particular above mentioned, was not destroyed by the amendment of 1870 (chap. 51, Laws of 1870), to said act of 1848. *Id.*
9. Accordingly *held* (RAPALLO and EARL, JJ., dissenting), that a bequest to said corporation in the will of a man who died within a month after the execution thereof, leaving a wife surviving, was void. *Id.*
10. Also *held* (RAPALLO and EARL, JJ., dissenting), that a bequest to the New York City Mission and Tract Society was void because of a similar provision of its charter (chap. 63, Laws of 1860). *Id.*
11. The provision of the act of the Legislature of Pennsylvania of 1853, relating to corporations, etc., which prohibits devises or bequests to any body politic, or person in trust, for religious or charitable uses, unless by will executed at least one month before the death of the testator, relates to and affects the power to take as well as the power to devise (RAPALLO and EARL, JJ., dissenting). *Id.*
12. A religious corporation, therefore, of the said State cannot take a bequest to it in trust for such purposes contained in a will executed in this State by a citizen thereof within one month of his death; and such a bequest is void (RAPALLO and EARL, JJ., dissenting). *Id.*

13. The right of a corporation to take by devise or bequest is subject to the general laws of the State in regard thereto, passed subsequent to its incorporation. *Id.*
14. The will of K., which contained various legacies, some held void as above, gave to his wife the net income derived from his estate, after payment of the legacies, during her life, and the principal left of the estate after her death to various societies. *Held* (RAPALLO and EARL, JJ. dissenting), that the sums attempted to be bequeathed by the void legacies were undisposed of by the will, and were to be distributed as in case of intestacy. *Id.*
15. The general rule that in a will of personal property a general residuary clause carries whatever is not otherwise legally disposed of, does not apply to a residuary clause limited by its terms to what remains after payment of specific legacies; in such case if any of the legacies are void there is another residuum which is undisposed of. *Id.*
16. In the interpretation of a residuary clause in a will the court will look not only at the language employed but the surrounding circumstances to determine what the intention of the testator was. *Id.*
17. Where a will directs real estate to be converted into money, and the proceeds distributed, the parties entitled thereto may, if of lawful age, and if the rights of others will not be affected, elect to take the lands and prevent the actual conversion thereof into personalty. *Prentice v. Janssen.* 478
18. No distinct or positive act is required; a slight expression of intent will be considered sufficient to show an election. *Id.*
19. The will of B. authorized his son F. to carry on the hotel business for five years, if he so desired, in a certain hotel owned by the testator; and empowered his executors to sell the hotel property, after the occupancy of his son had ceased, and divide the proceeds among his residuary legatees. F. died before the testator; no action was ever taken by the executors to sell the property. Three of the four legatees, or their successors in interest, conveyed their interests to plaintiff. Defendant M., the other legatee, joined with the plaintiff in making leases of the property; and large sums were expended by them in making improvements. In an action for partition, the only surviving executor was made a party defendant, as the husband of M.; he did not, by his answer, claim any rights as executor, or that he was a proper party as such. *Held*, that the executors took no interest in the lands, but merely a power in trust, to be executed simply for the purposes of distribution liable to be defeated by a re-conversion into realty of the property which was converted by the will into personalty; that the parties beneficially interested had a right to elect to make such a re-conversion and their acts showed such an election; that the power of sale thereby became extinguished, and the parties became owners as tenants in common, and so that a partition was proper; also that the surviving executor had no title, interest, or lien upon the property which rendered him a necessary party to the action as such executor; that the provision of the Revised Statutes (1 R. S., § 107), which makes a power of sale a lien or charge upon land, had no application, as the power had ceased to exist; also that equity would not interpose to compel the execution of the power (1 R. S., § 90), as the purpose had been accomplished without its exercise. *Id.*
20. The will gave various legacies; this action was commenced seven years after the testator's death; it did not appear that any debts or legacies remained unpaid. *Held*, that these facts did not make the executor, as such, a necessary party; that, as the debts and legacies are primarily to be paid out of the personalty, the presumption was that they had been

paid, particularly as no such defense, as that they were unpaid, was set up in the answer or interposed on the trial; also that the same presumption also existed as to testamentary expenses. *Id.*

21. C., one of the residuary legatees, died leaving a will, by which she authorized her executor, during the minority of the beneficiaries named in the will, to sell or lease jointly with the other owners of the undivided shares in the property. After one of the devisees became of age the executor conveyed to defendant M. all the interest and estate vested in him as such, in one of the lots, part of the hotel property. *Held*, that the deed was invalid and conveyed no title. *Id.*

22. The will of P. gave all of his estate, real and personal, to his executors in trust, with power to sell, and out of the proceeds of sale, or of the income, to pay to the wife of the testator a specified annuity during life, the same to be "in lieu of all dower or thirds" in his estate; his residuary estate he gave, one-third to his wife, one-third to R., the balance he gave to his executors, "to be divided by them among such Roman Catholic charities, institutions, schools or churches in the city of New York" as the majority of his executors should decide, and in such proportions as they should think proper. At the time of the testator's death there were, in said city, many incorporated Roman Catholic charities, institutions, schools and churches capable of taking by devise or bequest; and a majority of the executors designated certain of said organizations as the beneficiaries. In an action to obtain a construction of the will, *held*, that as there were organizations of the class specified capable of taking, and which could be ascertained, the provision as to them was not void for uncertainty; that the fact that power was conferred upon the executors to designate the beneficiaries, and the share of each did not impair or affect the legality of the provision; that the ex-

ecutors were limited to such organizations as were capable of taking; also that by the terms of the will there was an equitable conversion of the testator's real estate into personalty. *Power v. Cassidy* 602

23. *It seems*, that, had there been a failure to make the selection, the court would have power to decree the execution of the trust. *Id.*

24. Also, *held*, that the widow of the testator was entitled to one-third of the whole residuary estate, including one-third of the sum set apart and invested to produce the annuity; that the provision, giving to her a third, was not inconsistent with the provision providing for an annuity, but was a gift in addition to it. *Id.*

25. Where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended a sale, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative. *Id.*

26. Orders were made directing the various corporations designated by the executors as the beneficiaries under the will to be brought in as parties defendant. *Held*, no error, that they were interested in the controversy, and were properly made parties under section 122 of the Code of Procedure. *Id.*

See DEVISE.

WITNESS

— *When party incompetent as a witness under section 829 of Code.*
See Church v. Howard. 415

WRIT OF ERROR.

See ERROR (WRIT OF).

WRIT OF PROHIBITION.

See PROHIBITION (WRIT OF).

See Church v. Howard. ✓

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